United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL WITH PROOF OF SERVICE

77-7239

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
AUG 31 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

B
P/S

NATIONAL EQUIPMENT RENTAL LTD.

Plaintiff-Appellant,

v.

H. WALTER HENDRIX III and JEAN K. HENDRIX,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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(6536)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

NUMBER		FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R Z	DEMAND	JUDGE NUMBER	JURY	DOCKET
75	0026	01	07	75	4	190	1	24			0715		

APPEAL WEINSTEIN

PLAINTIFFS

NATIONAL EQUIPMENT RENTAL, LTD.

NATIONAL EQUIPMENT RENTAL, LTD.

DEFENDANTS

HENDRIX, H. Walter III et ano

H. WALTER HENDRIX, III and
SEAN K. HENDRIX

CAUSE

28 USC 1332
Unpaid balance due on lease of personal property as a result of breach of lease by deft.

ATTORNEYS

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~~410 Lakeville Road~~
~~Lake Success, NY 11040~~
~~343-1035~~

For PLAINTIFF:
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Stanley S. Arkin
300 Madison Avenue
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869-1450

CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD JS-5	DATE MAILED

[illegible] Before SCHUTTEMAN Mem – Case called & adjd to 2-2-76 at 2 P.M. [illegible]

Recd 8/2/7[illegible]

BEST COP[illegible]

PROCEEDINGS

-75	Complaint filed. Summons issued.	(1)
1/8/75	Summons retd and filed. Executed.	(2)
2-13-75	By WEINSTEIN, J. - Order dtd 2-7-75 extending time to answer complaint to 3-1-75 filed.	(3)
2/28/75	By WEINSTEIN,J.- Order dated 2/27/75 filed that the time for the deft to answer the aomplaint is extedded to 3/14/75	(4)
3/14/75	Notice of Motion , ret. 3/26/75 filed re: granting defts leave to join additional parties as defts to counterclaims,etc.	(5)
3-25-75	Letter from Jerome Heller dtd 3-24-75 filed.	(6)
3-25-75	By WEINSTEIN, J. - Order dtd 3-26-75 adjourning motion ret 3-26-75 to 4-4-75 filed.on document #6.	
4-4-75	Before WEINSTEIN, J.--Case called & referred to Magistrate. Order signed.	
4-4-75	By WEINSTEIN, J. - Order dtd 4-4-75 referring above case to the U.S. Magistrate filed.(p/c mailed to pltff).	(7)
4-21-75	Affidavit of Serald S. Jacobs filed.	(8)
4-21-75	Memorandum of Law filed.	(9)
4-25-75	Before WEINSTEIN, J.-Case called. Motion to join third party deft argued and denied w/o prejudice. So ordered.	(1
5-02-75	ANSWER filed.	
5-8-75	Before CATOGGIO, US MAG-Conference held. Further conference set for 6-25-75.	(1
5-14-75	Jury demand filed.	
5-21-75	By WEINSTEIN, J. - Order dtd 5-20-75 substituting attys of record for pltff filed.	(12)
		(13)
5-23-75	Pltff's reply to counterclaim filed.	
5-28-75	Letter dtd 5-27-75 to J. Weinstein from Jonathon Pollack filed.	(14)
5-28-75	Notice of motion ret 6-10-75 for an order striking defts' demand for trial by jury as to the issues etc filed.	(15)
6/3/75	Pltff's Memorandum Supporting Motion to Strike Deft's Jury Demand filed.	(16)
6/6/75	Letter dated 6/4/75 filed from M. Arisohn to J. Weinstein	(17)
6/6/75	By WEINSTEIN,J.- Order dated 6/5/75 filed that the return date on pltff's motion be adjd to 6/25/75	(18)
6-25-75	Before WEINSTEIN, J.-Case called. Motion to strike jury argued and denied, with leave to submit evidence. So ordered. Opinion read into record.	
6/25/75	Before CATOGGIO,MAG.- Case called- conference held-attys present discussions had- further conference set for 9/19/75 at 10:30 A.M.	
9/22/75	Before CATOGGIO, MAG.- Conference adjd to Sept. 26, 1975	
9-26-75	Before CATOGGIO, US MAG. Conference held. Schedule prepared. Further conference scheduled for 10-30-75.	
10-21-75	Before SCHIFFMAN, US MAG.--Case called. Deposition held in Rm 291. Parties present. Conference scheduled for 10-30-75.	
10/30/75	Before SCHIFFMAN, MAG.- Conference convened- All parties present- Conference adjd to 12/4/75	
12/4/75	Before SCHIFFMAN, MAG.- Conference adjd telephonically to 1/5/76	
1-7-76	Interrogatories filed. (mg)	(19)
1-7-76	Answers interrogatories filed. (mg)	(20)
1-5-76	Before SCHIFFMAN, Mag. - Case called & adjd to 2-2-76 at 2:00 P.M. [illegible]	

Rec'd 8/2/77

Y AVAILABLE

CONTINUATION SHEET A-3

	DEFENDANT	DOCKET NO.
...IONAL EQUIPMENT RENTAL	HENDRIX	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
2-24-76		Before SCHIFFMAN, MAG-Conf. convened before Mag. Motion to admit and motions for summary judgment to be accomplished. Conf. adj'd to 4-1-76/
3-12-76		By WEINSTEIN,J.- Order dtd. 3-10-76 setting 5-6-76 for status conf filed. (21)
4-1-76		Before SCHIFFMAN, MAG-Conf. adj'd to 5-6-76 before Mag. Catoggio.
5-6-76		Before WEINSTEIN,J.-Case called. Status report conf.held & concluded. Trial set for 9-15-76. ---
5-6-76		By WEINSTEIN,J.-Certificate of engagement and civil pre trial order dtd 5-6-76. Attys shall appear 9-15-76. (22)
5-06-76		Before CATOGGIO, MAG-Conf adj'd to 8-27-65.
8-9-76		Before CHREIN,Mag.- Case called for conf and adjd to 8-12-76
8-27-76		Stipulations of facts for trial filed. (23
8-27-76		Conf. convened. Case cannot be settled. Case ret'd to J. Weinstein for trial. Memorandum submitted on same.
9-15-76		Before WEINSTEIN,J.- Case called for trial Trial ordered and begun Jury selected and sworn Trial cont'd to 9-16-76
9-16-76		Before WEINSTEIN,J-Case called. Trial resumed. Motion to dismiss is denied. Trial cont'd to 9-17-76
9-17-76		Before WEINSTEIN,J-Case called. Trial resumed. Jury returns a verdict pf $103,500.00 as the reasonable amount and finds commerically unreasonalbe. Motions adjd w.o date.
9-20-76		By WEINSTEIN,J-Order of sustenance filed.)24)
9-24-76		Letter dtd. 9-20-76 from J. Pollack to Judge Weinstein re: prpposed judgment filed. (2
9-24-76		By WEINSTEIN,J.- Order dtd, 9-22-76 that the Court will await filin of briefs filed on doc.# 25,pg.2. copy mailed ---
9-28-76		Letter dtd 9-24-76 to J. Weinstein from deft's atty re post trial motions filed. (26
10-12-76		Sten. transcript dtd. 9-15-76 filed. (27
10-29-76		Sten. transcript dtd 9-16-76 filed. (28
11-4-76		Letter dtd 11-1-76 to J. Weinstein from Jonathan V. Pollack re additional time to submit memo in support of judgment for the pltff filed. BY WEINSTEIN,J-ORDER dtd 11-3-76 granting add'l time--one month. (2
11-17-76		Sten. transcript dtd. 9-17-76 filed. (30
11-17-76		Copy of letter dtd. 11-15-76 from M. Arisohn to J. Pollack filed (31
11-18-76		Copy of letter dtd 11-17-76 to Stanley S. Arkin from Jonathan Pollack filed. (32
~~11-29-76~~		~~Post trial memo in support of judgment for pltff filed.~~
11-29-76		Post trial memo in support of judgment for pltff filed. (3
2/3/77		Copy of letter to Jonathan Pollack, Esq. from Judge Weinstein dtd 2/2/77 re: post trial briefs in regard to the law of South Carolina. (34
2/3/77		By Weinstein, J Order dtd 2/3/77 filed re on 2/18/77 all parties shall appear to discuss the possibility of settlement to set a schedule for completing preparation for further trial and on the issue and to fix trial dates, copies mailed to parties etc. (3

Deputy Clerk

Rec'd 8/2/77

CONTINUATION SHEET A-4

...ional Equipment Rental	DEFENDANT Hendrix	DOCKET NO. 75-C- PAGE ___ OF ___ P.

DATE	NR.	PROCEEDINGS
2-18-77		Before WEINSTEIN,J=Case called. Stip. by parties that the New York law of usery applies and that the New York rule of conflicts is not to be applied. Trial set for 4-5-77.
2-22-77		By WEINSTEIN,J-Civil pre trialorder ret 4-5-77 filed.
3-8-77		Before PLATT,J-Case called. Trial resumed. Trial cont'd 3-9-77.
3-29-77		Notice of motion to reargue motion to strike jury demand filed with memo in support. (3
3-29-77		Letter dtd 3-28-77 to J. Weinstein from Jonathan V. Pollack re motion to reargue. (3
3-29-77		By WEINSTEIN,J-Order dtd 3-29-77 that motion to reargue is denied. Copy mailed to parties.
4-5-77		Pltff's request for voir dire & request to charge filed. (39
4-5-77		Deft's questions to prospective jurors & requests to charge filed. (41
4-6-77		Before WEINSTEIN,J Case called. Trial ordered & begun as to the issue of usury. Trial cont'd to 4-6-77.
4/7/77		Before WEINSTEIN,J - Case called. Trial resumed. Court charges jury. Alternates discharged. Marshals sworn. Jury retires for deliberations. Jury returns and renders a verdict for the deft. Def motion to dismiss the complaint is granted. Pltffs motion to set aside the verdict is denied with not costa or disbursements. Trial concluded. Jury discharged. Order of dismissal signed.
4/7/77		By Weinstein, J Order dtd 4/6/77 filed re that this action is dismi w/o costs and disbursement.
4/8/77	Jdg	Judgement dtd 4/7/77 filed re that the pltff take nothing of the d and that the deft's motion to dismiss the complain is granted w/o costs or disbursement. (4
4/12/77		By Weinstein, J Order dtd 4/7/77 filed re defts have made a motion to set aside the verdice declaring the tranaaction a loan and usuri The court denies the motion.The motion for judgement notwithstandin the verdict is denied. (4
5/5/77		Notice of Appeal filed by pltff.Copy mailed to C. of A. Atty. for def. has already been served. lg. (46
5/27/77		Certified cppy of scheduling order received from the C of A and filed. tk (47
6-6-77		Copy of civil appeal scheduling order rec'd form C of A & filed. Record to be docketed by 6-22-77. ld (48)
6/13/77		By WEINSTEINJ. - Order filed that the time which the pltff shall transmit the record on appeal is extended to and including 7/30/77. t k (49)
7/27/77		Copy of scheduling order received from the C. of A. filed. tk (50)
8-1-77		Stenographer's transcript dated 4-6-77 filed. (51)
8-1-77		Stenographer's transcript dated 4-7-77 filed (52)

A TRUE COPY ATTEST DATE 8/1/77 CLERK BY ___ CLERK

Recd 8/2/77

A-5

SUMMONS

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-64)
(Formerly D. C. Form No. 45 Rev. (6-49))

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

75C 26

CIVIL ACTION FILE NO. 75C 26

NATIONAL EQUIPMENT RENTAL, LTD., Plaintiff v. H. WALTER HENDRIX, III and JEAN K. HENDRIX, Defendants	SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon GERALD S. JACOBS,

plaintiff's attorney , whose address is 410 Lakeville Road, Lake Success, N.Y.11040

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

L Orgel
Clerk of Court.

Marilyn Glenn
Deputy Clerk.

Date: January 7 , 1975.

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff,

-against-

H. WALTER HENDRIX, III and JEAN K. HENDRIX,

Defendants.

The plaintiff above named by GERALD S. JACOBS, attorney, complaining of the defendants, respectfully shows to this Court and alleges;

FIRST CAUSE OF ACTION AGAINST THE DEFENDANT, H. WALTER HENDRIX, III

1. That at all of the times hereinafter mentioned, plaintiff was and still is a Delaware corporation having its principal place of business in Nassau County, and having been duly qualified to do business in the State of New York.

That at all of the times hereinafter mentioned all of the defendants were residents of the State of South Carolina.

That the amount in controversy in this cause exceeds the sum of $10,000.00, exclusive of interest and costs.

2. Upon information and belief that at all of the times hereinafter mentioned, H. WALTER HENDRIX, III, the defendant (hereinafter referred to as HWH) was and still is an individual doing business under his own name in the State of South Carolina.

3. That heretofore and on or about the 14th day of May, 1974, plaintiff leased certain equipment to the defendant, HWH, pursuant to a written lease designated 50-205A, a copy of which is attached hereto and marked Exhibit A, which lease had been assigned to a bank as collateral security and has since been reassigned to plaintiff. That said lease was for a term of 49 months commencing on the 20th day of May, 1974, and under the terms of the said lease, the defendant herein agreed to pay the sum of $866.29 plus tax per month commencing on the 20th day of

May, 1974, and a like sum of $866.29 plus tax on the 20th day of each and every succeeding month thereafter, to and including the 20th day of May, 1978.

4. That said defendant, HWH, defaulted in paying the said rentals due under the said lease for the month of July, 1974, and all of the months subsequent thereto.

5. That plaintiff in accordance with the terms of the lease, duly notified said defendant of its default, but defendant failed to cure the same within the time limited under the terms of said lease.

6. That by reason of the defendant's default as aforesaid, plaintiff in accordance with the terms of said lease declared all of the sums due thereunder due and payable, to wit, the sum of $39,604.45 with interest thereon from July 20, 1974.

7. That no part of said sum has been paid although duly demanded, and there is presently due and owing from the defendant under the lease aforesaid, the sum of $39,604.45 with interest thereon from July 20, 1974.

SECOND CAUSE OF ACTION AGAINST THE DEFENDANT H. WALTER HENDRIX, III

8. Plaintiff repeats and reiterates each and every allegation contained in paragraphs "1" and "2" of this complaint, as if fully set forth at length herein.

9. That heretofore and on or about the 25th day of June, 1974, plaintiff leased certain equipment to the defendant, HWH, pursuant to a written lease designated 50-205B, a copy of which is attached hereto and marked Exhibit B, which lease had been assigned to a bank as collateral security and has since been reassigned to plaintiff. That said lease was for a term of 42 months commencing on the 20th day of July, 1974, and under the terms of the said lease the defendant herein agreed to pay the sum of $2,744.39 plus the appropriate State tax per month commencing on the 20th day of July, 1974, and a like sum of $2,744.39

plus the appropriate tax on the 20th day of each and every succeeding month thereafter, to and including the 20th day of December, 1977.

10. That said defendant, HWH, defaulted in paying the rentals due under said lease for the month of August, 1974, and the months subsequent thereto.

11. That plaintiff in accordance with the terms of the lease duly notified said defendant of its default, but defendant failed to cure the same within the time limited under the terms of said lease.

12. That by reason of defendant's default as aforesaid, plaintiff in accordance with the terms of said lease declared all of the sums due thereunder due and payable, to wit, the sum of $104,286.82 with interest from July 20, 1974.

13. That no part of said sum has been paid although duly demanded, and there is presently due and owing from the defendant under the lease aforesaid, the sum of $104,286.82 with interest thereon from July 20, 1974.

THIRD CAUSE OF ACTION AGAINST THE DEFENDANT H. WALTER HENDRIX, III

14. Plaintiff repeats and reiterates each and every allegation contained in paragraphs marked "1" through "13" inclusive of this complaint as if fully set forth at length herein.

15. That pursuant to the aforementioned lease agreement, in the event of a default, the plaintiff, as lessor, had the right to repossess the equipment leased to the defendant, HWH, under the aforementioned lease and to sell the same at public or private sale. That the plaintiff did repossess the said equipment and sold the same for a net price to the plaintiff of $76,500.00, which sum was credited to the account of the defendant lessee, thereby reducing the amount owed on the first and second causes of action from a total of $143,891.27 to a total of $67,391.27.

16. That pursuant to the aforementioned lease agreements in the event of a default, the occupant became liable for all ex-

penses of the lessor including legal expenses and attorney's fees equal to 20% of the unpaid balance of both leases.

17. That by reason of the foregoing, the defendant is liable for attorney's fees in the amount of $13,478.25, no part of which has been paid although duly demanded.

FOURTHCAUSE OF ACTION AGAINST
DEFENDANT JEAN K. HENDRIX

18. Plaintiff repeats and reiterates each and every allegation in paragraphs marked "1" through"17", inclusive of this complaint as if fully.set forth at length herein.

19. That the defendant, JEAN K. HENDRIX, (hereinafter referred to as GUARANTOR) unconditionally guaranteed all sums due and to become due to the lessor under the aforementioned leases by an instrument in writing dated April 30, 1974, a copy of which is attached hereto and marked Exhibit C.

20. That by reason of the foregoing and pursuant to the default of the defendant, HWH, under the two aforementioned leases, plaintiff did make demand upon the defendant, GUARANTOR, to pay all sums due under the said two lease agreements, to wit, the sum of $80,869.52, which sum the defendant, GUARANTOR, failed and refused to pay.

21. That by reason of the foregoing, the defendant, GUARANTOR, is indebted to the plaintiff in the sum of $80,869.52, payment of which has been demanded and refused.

WHEREFORE, plaintiff demands judgment against the defendant, HWH, on the first, second and third causes of action in the sum of $80,869.52 together with interest thereon from the 20th day of July, 1974, and judgment against the defendant, GUARANTOR, on the fourth cause of action in the sum of $80,869.52 together with interest thereon from the 20th day of July, 1974, together with the costs and disbursements of this action.

S/

Gerald S. Jacobs,
Attorney for Plaintiff
410 Lakeville Road
Lake Success, N. Y. 11040
(212) 343-1000

ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

NATIONAL EQUIPMENT RENTAL, LTD., :

Plaintiff, : ANSWER

: 75 Civ. 26 (JBW)

-against- :

H. WALTER HENDRIX, III, and JEAN K.: HENDRIX,

: Defendants. :

----------X

Defendants, H. Walter Hendrix, III ("Hendrix") and Jean K. Hendrix, by their attorneys, STANLEY S. ARKIN, p.c., in answer to the complaint allege as follows:

1. Deny the allegations contained in Paragraph 1 of the complaint except deny having knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is a Delaware corporation having its principal place of business in Nassau County, having been duly qualified to do business in the State of New York, but admit that Hendrix and Jean K. Hendrix are residents of the State of South Carolina.

2. Admit the allegations of Paragraph 2 of the complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 3 and 9 of the complaint.

4. Deny the allegations of Paragraphs 4, 5, 6, 7, 10, 11, 12, 13, 16, 17, 19, 20, and 21 of the complaint.

5. Deny the allegations of Paragraph 15 of the complaint, except deny knowledge or information sufficient to

form a belief as to the truth of the allegations that plaintiff sold the equipment alleged "for a net price to plaintiff of $76,500.00," and admit that the equipment was taken from Hendrix by a man named "Whitehurst" who represented himself as an agent and employee of plaintiff.

6. Repeat and reallege each and every allegation set forth in Paragraphs 1 through 10 of this answer with the same force and effect as if fully set forth herein in answer to Paragraphs 8, 14, and 18 of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE
BY BOTH DEFENDANTS

7. Defendants deny that this Court has personal jurisdiction over them in that the summons and complaint herein were not served in accordance with either the Federal Rules of Civil Procedure or the Constitution of the United States, and any contract provision purporting to grant this Court such personal jurisdiction is unconscionable.

FOR A SECOND AFFIRMATIVE DEFENSE
BY BOTH DEFENDANTS

8. Upon information and belief, plaintiff is not now, was not at the times alleged in its complaint, nor has it ever been authorized by the State of South Carolina to do business within the State of South Carolina, and accordingly, the two "equipment leases" alleged in plaintiff's complaint, made by plaintiff in the State of South Carolina, are void and unenforceable.

FOR A THIRD AFFIRMATIVE DEFENSE
BY BOTH DEFENDANTS

9. The two "equipment leases" alleged in plaintiff's complaint were not leases, but were, in effect, conditional sales contracts.

10. The agreements entered into between plaintiff and Hendrix were corrupt and unlawful agreements under which plaintiff extracted and demanded, and defendant Hendrix was compelled to agree to pay interest in excess of the legal maximum rate of interest.

FOR A FOURTH AFFIRMATIVE DEFENSE
BY BOTH DEFENDANTS

11. Plaintiff had no good faith basis for declaring a default on the two "equipment leases" alleged in its complaint and did not act in a commercially reasonable manner in declaring the default and in demanding acceleration of all payments allegedly due.

FOR A FIFTH AFFIRMATIVE DEFENSE
BY DEFENDANT JEAN K. HENDRIX

12. The "guaranty" alleged in plaintiff's complaint was made without consideration of any kind to Jean K. Hendrix.

FOR A SIXTH AFFIRMATIVE DEFENSE
BY DEFENDANT JEAN K. HENDRIX

13. The April 30, 1974 "guaranty" alleged in plaintiff's complaint predates the "equipment lease" dated June 11, 1974, and cannot be enforced to guaranty an obligation which did not exist as of the date the alleged "guaranty" was executed.

FOR A SEVENTH AFFIRMATIVE DEFENSE
BY DEFENDANT JEAN K. HENDRIX

14. Enforcement of the alleged April 30, 1974 "guaranty" to indemnify plaintiff on an obligation which did not exist as of April 30, 1974, would be unconscionable and in violation of the Constitution of the United States.

FOR A FIFTH AFFIRMATIVE DEFENSE
BY DEFENDANT HENDRIX, EIGHTH AFFIRMATIVE
DEFENSE BY DEFENDANT JEAN K. HENDRIX AND
FIRST COUNTERCLAIM BY DEFENDANT HENDRIX

15. Defendants Hendrix and Jean K. Hendrix are citizens of the State of South Carolina.

16. Upon information and belief plaintiff is a Delaware corporation having its principal place of business in Nassau County, State of New York.

17. The matter in controversy herein exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

18. The jurisdiction of this Court is based upon the complete diversity of citizenship of the parties herein and an amount in controversy exceeding Ten Thousand ($10,000.00) Dollars exclusive of interest and costs as provided by Title 28, United States Code, Section 1332 (a)(1), and the existence of a special federal question arising under Title 42, United States Code, Section 1983 (Title 28, United States Code, Sections 1343[3] and 1343[4]).

19. Plaintiff, by selling the equipment it repossessed for a net price of $76,500.00, penalized defendants and failed to mitigate its alleged loss in that the equipment was not sold in a commercially reasonable manner for a commerically reasonable price but rather sold at a price far below the fair market value of the equipment.

20. By reason of the foregoing, plaintiff lost whatever right it may have had to a deficiency.

21. Also by reason of the foregoing, Hendrix was damaged in the amount of Thirty-Nine Thousand, One Hundred Four Dollars and Thirty-Six Cents ($39,104.36).

FOR A SIXTH AFFIRMATIVE DEFENSE
BY DEFENDANT HENDRIX, NINTH AFFIRMATIVE
DEFENSE BY DEFENDANT JEAN K. HENDRIX AND
SECOND COUNTERCLAIM BY DEFENDANT HENDRIX

22. Defendants repeat and reallege each and every allegation contained in Paragraphs 15 through 21 of this answer with the same force and effect as if fully set forth herein.

23. The equipment identified in the "equipment lease" dated April 30, 1974 (annexed to plaintiff's complaint as Exhibit A), was originally leased by Hendrix from Western Carolina Tractor Co. of Columbia, South Carolina on November 8, 1973.

24. The terms of the agreement between Hendrix and Western Carolina Tractor Co. provided that at the completion of the term of the lease, Hendrix would be entitled to exercise an option to purchase all right, title, and interest in the equipment leased for a nominal sum.

25. The equipment identified in the "equipment lease" dated June 11, 1974 (annexed to plaintiff's complaint as Exhibit B), was originally leased by Hendrix from Jeff Hunt Machinery Co. of West Columbia, South Carolina, on December 5, 1973.

26. The terms of the agreement between Hendrix and Jeff Hunt Machinery Co. provided that at the completion of the term of the lease, Hendrix would be entitled to exercise an option to purchase all right, title, and interest in the equipment leased for a nominal sum.

27. In order to induce Hendrix to enter into the two "equipment leases" alleged in plaintiff's complaint, and in order to induce Jean K. Hendrix to execute the "guaranty" alleged in plaintiff complaint, plaintiff, through its duly authorized agents, employees, and representatives, stated and

represented to Hendrix and Jean K. Hendrix that it would finance the balance of the leases between Hendrix and Western Carolina Tractor Co. and Jeff Hunt Machinery Co., and that upon the completion of the term of the financing, Hendrix would be entitled to the same option to purchase all right, title, and interest in the equipment for a nominal sum as was originally granted Hendrix by Western Carolina Tractor Co. and Jeff Hunt Machinery Co.

28. The statements and representations so made by plaintiff through its duly authorized agents, employees, and representatives were false, misleading, and fraudulent and were known by plaintiff to be false, misleading, and fraudulent when made.

29. In truth and in fact, plaintiff never intended to permit Hendrix to exercise an option to purchase all right, title, and interest in the equipment; defendants did not know the truth with regard to plaintiff's statements and representations but believed them to be true, relied upon them, and Hendrix was induced thereby to enter the two "equipment leases" alleged in plaintiff's complaint, and Jean K. Hendrix was induced thereby to execute the "guaranty" alleged in plaintiff's complaint.

30. Hendrix would not have entered into the two "equipment leases" and Jean K. Hendrix would not have executed the "guaranty" had they known the truth with regard to plaintiff's statements and representations.

31. By reason of the foregoing, the two "equipment leases" and the "guaranty" alleged in defendant's complaint are void and unenforceable.

32. Also by reason of the foregoing, Hendrix was damaged in the amount of Fifty Thousand ($50,000.00) Dollars.

FOR A SEVENTH AFFIRMATIVE DEFENSE BY DEFENDANT HENDRIX, TENTH AFFIRMATIVE DEFENSE BY DEFENDANT JEAN K. HENDRIX AND THIRD COUNTERCLAIM BY DEFENDANT HENDRIX

33. Defendants repeat and reallege each and every allegation contained in Paragraphs 15 through 32 of this answer with the same force and effect as if fully set forth herein.

34. Upon information and belief, Gerald S. Jacobs, Esq., is plaintiff's secretary and general counsel, and at all times hereinafter mentioned, was acting in behalf of plaintiff within the scope of his agency, employment, and authority.

35. On or about December 6, 1974, defendants received a letter from Gerald S. Jacobs declaring a default on the two "equipment leases" alleged in plaintiff's complaint, demanding payment of $143,269.87, and announcing plaintiff's intention to sell the equipment at a designated time and place.

36. In response to Mr. Jacobs' letter, Hendrix had a telephone conversation with Mr. Jacobs in which Mr. Jacobs stated and represented to Hendrix not to worry about the proposed sale.

37. The statements and representations made by plaintiff, through its duly authorized agent, employee, and representative Jacobs, as to the time and place for the intended sale of the equipment and Jacobs' statement and representation to Hendrix not to worry about the proposed sale were false, misleading, and fraudulent and were known by plaintiff and Jacobs to be false, misleading, and fraudulent when made.

38. In truth and in fact, plaintiff's sale of the equipment occurred at some time and place other than at the

time and place designated by plaintiff and Jacobs, and defendant Hendrix did not know the truth with regard to plaintiff's statements and representations, but believed them to be true and relied upon them.

39. By reason of the foregoing, defendant Hendrix suffered damages in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars.

FOR AN EIGHTH AFFIRMATIVE DEFENSE BY DEFENDANT HENDRIX, ELEVENTH AFFIRMATIVE DEFENSE BY DEFENDANT JEAN K. HENDRIX AND FOURTH COUNTERCLAIM BY DEFENDANT HENDRIX

40. Defendants repeat and reallege each and every allegation contained in Paragraphs 15 through 39 of this answer with the same force and effect as if fully set forth herein.

41. Upon information and belief, Joseph Whitehurst is plaintiff's duly authorized agent, employee, and representative, and at all times hereinafter mentioned, was acting within the scope of his agency, employment, and authority.

42. In or about December, 1974, Whitehurst intentionally and willfully and at the specific direction of plaintiff seized from Hendrix without legal right the equipment which is the subject of the two "equipment leases" alleged in plaintiff's complaint.

43. Such equipment was sold to some third party by Whitehurst at the specific direction of plaintiff.

44. Plaintiff knowingly and willfully failed to provide defendants with either proper notice or an opportunity to be heard with regard to either the seizure or sale of the equipment.

45. The acts by plaintiff and its agents, employees, and representatives in seizing the equipment from Hendrix and selling it without proper notice to Hendrix and without granting Hendrix an opportunity to be heard were committed under color of State law, deprived defendant Hendrix of rights, privileges, and immunities secured by the Constitution and laws of the United States, and thereby violated Title 42, United States Code, Section 1983.

46. As a consequence and result of this deprivation, defendant Hendrix was subjected to great indignity and humiliation, suffered emotional distress and damage to his good business reputation, and suffered extensive monetary damages in the total amount of Five Hundred Thousand ($500,000.00) Dollars.

FOR A FIFTH COUNTERCLAIM
BY DEFENDANT HENDRIX

47. Defendant Hendrix repeats and realleges each and every allegation contained in Paragraphs 15 through 46 of this answer with the same force and effect as if fully set forth herein.

48. The acts of plaintiff alleged in Paragraphs 23 through 54 of this answer were committed knowingly, intentionally, and maliciously. Defendant Hendrix is therefore entitled to exemplary damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

WHEREFORE, defendants demand judgment:

(1) dismissing the complaint;

(2) the total sum of Thirty-Nine Thousand, One Hundred Four Dollars and Thirty-Six Cents ($39,104.36) compensatory damages, together with interest according to law as to

defendant Hendrix's first counterclaim;

(3) the total sum of Fifty Thousand ($50,000.00) Dollars compensatory damages, together with interest according to law as to defendant Hendrix's second counterclaim;

(4) the total sum of One Hundred Fifty Thousand ($150,000.00) Dollars compensatory damages together with interest according to law as to defendant Hendrix's third counterclaim;

(5) the total sum of Five Hundred Thousand ($500,000.00) Dollars compensatory damages together with interest according to law as to defendant Hendrix's fourth counterclaim;

(6) the sum of Five Hundred Thousand ($500,000.00) Dollars exemplary damages as to defendant Hendrix's fifth counterclaim;

(7) all costs and disbursements of this action; and

(8) such other and further relief as to this Court seems just and proper.

STANLEY S. ARKIN, p.c.
Attorneys for Defendants
300 Madison Avenue
New York, New York 10017

BY Mark S. Arisohn
Mark S. Arisohn

TO:

GERALD S. JACOBS, ESQ.
Attorney for Plaintiff
410 Lakeville Road
Lake Success, New York 11040

REPLY TO COUNTERCLAIM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff,

-against-

H. WALTER HENDRIX III, and
JEAN K. HENDRIX,

Defendants.
----------X

REPLY TO COUNTERCLAIM
Index No. 75 Civ. 26
(JBW)

Plaintiff, as and for its reply to the counterclaims of defendant H. WALTER HENDRIX III, set forth in the defendants' answer, alleges as follows:

AS TO THE FIRST COUNTERCLAIM

1. Plaintiff denies the allegations contained in paragraphs "19", "20" and "21" of the answer.

AS TO THE SECOND COUNTERCLAIM

2. Plaintiff denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "23", "24", "25", and "26" of the answer.

3. Plaintiff denies the allegations contained in paragraphs "28", "29", "30" "31" and "32" of the answer.

4. Plaintiff denies the allegations contained in paragraph "27" of the answer, except admits that plaintiff agreed to give defendant an option to purchase the equipment leased, at specified prices and on specified terms and conditions, and plaintiff denies knowledge or information as to whether such prices, terms and conditions are the same as those, if any, contained in the options to purchase allegedly granted the defendant by Western Carolina Tractor Co. and Jeff Hunt Machinery Co.

AS TO THE THIRD COUNTERCLAIM

5. Plaintiff denies the allegations set forth in pragraphs "37", "38", and "39" of defendants' answer.

6. Plaintiff denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "35" of the answer, except admits plaintiff's transmittal on December 5, 1974 of a letter dated said date announcing plaintiff's intention to sell said equipment and stating the then current balance due of $143,269.87.

7. Plaintiff denies the allegations contained in paragraph "36" of the answer, except admits that a telephone conversation took place between defendant Hendrix and Mr. Jacobs.

AS TO THE FOURTH COUNTERCLAIM

8. Plaintiff denies the allegations set forth in paragraphs "42", "44", "45" and "46" of the answer.

9. Plaintiff denies the allegations set forth in paragraph "41" of the answer, except admits that plaintiff independently hired one Joseph Whitehurst to repossess the equipment which is the subject of the lease agreements between the parties.

10. Plaintiff denies the allegations contained in paragraph "43" of the answer, except admits that the equipment was sold to a third party.

AS TO THE FIFTH COUNTERCLAIM

11. Plaintiff denies the allegations set forth in paragraph "48" of the answer.

WHEREFORE, plaintiff demands that defendant's counterclaims be dismissed and that it be awarded judgment as prayed in the complaint.

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Attorneys for Plaintiff
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BY: Jonathan T. Pollack

TO: STANLEY S. ARKIN, P.C.
Attys. for Defs.,
300 Madison Avenue
New York, New York 10017

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 ----------x

4 NATIONAL EQUIPMENT, :

5 - against - : 75 C 26

6 HENDRIX, :

7 Defendant. :

8 ----------x

9 United States Courthouse
Brooklyn, New York

10

11 April 6, 1977
10:00 o'clock A.M.

12

13

14

15 B e f o r e :

16 HON. JACK B. WEINSTEIN, U.S.D.J.

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20

21

22

23

24 HENRY LEGENDRE
ACTING OFFICIAL COURT REPORTER

25

1

2 A p p e a r a n c e s :

3

4 JONATHAN POLLECK, ESQ.,
Attorney for Plaintiff

5

MARK S. ARISOHN, ESQ.,
6 Attorney for Defendant.

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1 THE CLERK: Civil Cause on Trial, National
2 Equipment vs. Hendrix.
3 (Whereupon, six jurors and two alternate
4 jurors were impaneled and duly sworn in by the clerk
5 of the Court.)
6 THE COURT: We are going to have openings now.
7 These are brief statements that are going to indicate
8 what the attorneys think the evidence will show.
9 MR. ARISOHN: Ladies and gentlemen, my name
10 is Mark S. Arisohn. I am the attorney for Mr. and
11 Mrs. Hendrix, who are defendants in this case. They
12 are being sued by the corporation called National
13 Equipment Rental, Ltd.
14 The evidence will show that it's a corporation
15 doing business here in New York and is a subsidiary
16 corporation to another corporation; that Mr. Hendix
17 and his wife are people who live down in South
18 Carolina; you heard them say Lexington, South Carolina.
19 Mr. Hendrix is a man who is in the construction
20 business. For years he is doing small jobs and that
21 kind of work. He came to need two pieces of heavy
22 equipment. We will hear what these are; one is called
23 a bulldozer and one is called a scraper. He will
24 testify, he'll tell you what these pieces of equipment
25 are.

It came to be that he went to two companies to get these pieces of equipment; one company is called Western Car Tractor; the other is Jeff Hunter Company. These companies are companies doing business in South Carolina; one is the local Harvester dealer; the other one is the local Caterpillar dealer. You will learn one piece of equipment was marketed at the time for around one hundred thousand dollars; the other around fifty thousand dollars. There was a period of time when he would purchase these pieces of equipment for monthly payments, to one company he was to pay $5200.00; to the other company he was to pay $2,000.00. Because of problems he had in collecting monies which were owed to him on his jobs, he could not make the payments to these companies of $7200.00 per month and went to a man by the name of Reed Hanna, who was the salesman for one of these companies, Western Car Company.

He said to Mr. Hanna that the payments he was making was too much, he couldn't afford to make them, is there any way that Mr. Hanna could find financing for Mr. Hendrix so the balance could be paid off and Mr. Hendrix' monthly payments would be lower. Mr. Hanna then came back to see Mr. Hendrix and another gentleman by the name of Robert P. Kelly, with some-

1 documents. The documents end up being documents of
2 National Equipment Rental, Ltd. There was a discussion
3 between these three men what these documents were as to
4 what the transaction that they were to enter into was
5 going to be; and it's going to be up to you, ladies
6 and gentlemen to determine what the real transaction
7 between these parties were.
8 You will see documents which are called leases.
9 These documents, and the set of these documents is what
10 you have to determine in this case. There is a dispute
11 between these parties, that's why we have courtrooms and
12 judges and juries.
13 This company is suing my client, Mr. and Mrs.
14 Hendrix, because after these documents were signed
15 which required Mr. Hendrix to pay to this company,
16 National Equipment, on one document, $866.00 per month;
17 and another document $2,400 some odd dollars per month.
18 Mr. Hendrix had the equipment for four or five months.
19 He ran into difficulties again and could not make the
20 payments; National Equipment came down, seized the equip-
21 ment away from Mr. Hendrix, sold it at a sale for a
22 certain amount of money and suing Mr. Hendrix here in
23 this court for the difference between what he owed
24 them over the terms of their contract, which were 42
25

1 months or 49 months, all of that money reduced by what
2 they got at this sale.
3 Now, the terms of the sale and the figures in-
4 volved in the sale are not before you in this trial.
5 You should understand that this man is being tried for
6 that amount of money. If you take the $866.00 per month
7 that he was supposed to pay National on the one contract
8 and the $2,700 per month and you multiply those by
9 what the contract calls for in terms of time, 42 months
10 and 49 months, you come up with a figure of $157,000.00.
11 National Equipment sold the equipment after they re-
12 possessed it for about $85,000.00 and Mr. Hendrix is
13 being sued here for the difference approximately.
14 The issue that you have to decide, ladies and
15 gentlemen, is whether or not these agreements were
16 loans or they were as the plaintiff claims leases, and
17 it is going to be your job to take a look underneath
18 these agreements and see what the real transaction was
19 because I say to you, the evidence will show National
20 Equipment had no interest in this equipment. It was
21 not a lendor's equipment, it was a finance sale. What
22 National did was to forward money to the two people,
23 two companies that were selling Mr. Hendrix these
24 pieces of equipment, that is all they did, they forwarded
25

money. In return for forwarding that money they asked Mr. Hendrix to pay the company these amounts of money per month.

It is our contention that the forwarding of that money and the requirements that Mr. Hendrix paid this amount of money per month amounted to no more than a usury loan; usury is two elements, one is whether these transactions actually amounted to loans as we contend; the second is if they amounted to loans, was the interest rate in excess of the legal maximum interest rate. The plaintiff in this case has made a very important confession, they have conceded that if in fact you find these were loans and they dispute that, but if in fact you find that these were loans, that the interest rate on those loans were in excess of the legal maximum interestrate.

The only issue that you have to decide in this case is whether or not these contracts were loans.

Now, how are you going to do that?

You are going to have to look at what the real transaction was, what this company through its agents said to Mr. Hendrix the real transaction was; what this company has said to other people their business consists of. You are going to have to look very carefully

1
2 beneath the letter of this lease, this so-called lease,
3 this document that says, "Lease" on it, Because to
4 use your common sense you will see a company that is
5 engage in making these kind of transactions is not
6 going to entitle a document which in fact is a usurious
7 loan.
8 I think the evidence will show it to you. I
9 think you will find that this form, this lease form is
10 used as a subterfuge in order to have this company
11 lend Mr. Hendrix and people like Mr. Hendrix money at
12 exhorbitant interest rates, that's what this case is
13 about.
14 We will show you --
15 THE COURT: It's not exhorbitant rate, it's
16 about usury which is a very technical definition.
17 It doesn't make any difference whether you think the
18 interest rate was fair or not, It was some 15 or 17
19 percent --
20 MR. ARISOHN: Excuse me, your Honor.
21 THE COURT: If it had been done under a lease
22 it cannot be considered exhorbitant, it's only a quest-
23 ion whether it was above the legal rate for loans.
24 You are not here to penalize anybody. The plaintiff
25 admits and concedes if it were a loan it was above the
legal rate; and if it were above the legal rate, whether

it was one percent, or half percent, it doesn't make any difference. The whole loan would be illegal and the plaintiff would not be entitled to get back what the defendant promised to pay. On the other hand, if it was a lease, and that's what you are going to decide, then it doesn't make any difference what the interest rate was, whether it was fifteen, seventeen, or thirty-percent, that doesn't make any difference. The plaintiff wouldn't be able to complain because it's none usurious.

You are not here to penalize anybody or decide whether anything is fair or not fair or what have you. The point of fact, the evidence may well show -- although this depends on how the parties present the case, that fifteen, seventeen percent is a normal interest rate of transactions of this kind, commercial transactions, but that doesn't make any difference; is that clear?

MR. ARISOHN: The issue that you do have to decide is whether or not the transaction was a loan or a lease; and I amsaying what you have to do is take a look at what the party's interest was on the equipment, National Equipment, were they like a landlord collecting rent; was National Equipment acting like a bank in

1 financing this purchase of the equipment.

2 I am not going to review for you each of the

3 elements I am going to hopefully establish during the

4 course of this trial,and I will have time to talk to

5 youagain at the end of the trial, to summarize for you

6 what I think the evidence will show.

7 Bear in mind, look underneaththis transaction,

8 look at what the party's interest were, and the equip-

9 ment; look at what Mr. Hendrix intended by this trans-

10 action. Look at what National Equipment Rental intended

11 by this transaction. The evidence will show unequivo-

12 cally that National Equipment did nothing more than

13 advance money for the use of Mr. Hendrix, and that

14 Mr. Hendrix was to pay National under the terms of this

15 contract. All they did and all they were required to

16 do after the contracts were signed, correct the monthly

17 payment. Thank you very much.

18 MR. POLLECK: Ladies and gentlemen, I think

19 the main issue in question that you have to decide

20 is fairly stated, that is whether or not these

21 transactions between the plaintiff, National Equipment

22 Rental; and the defendant Mr. Hendrix were loans on

23 the one hand or were some other kind of transaction,

24 some other kind of deal such as a lease or a conditional

25

1 sale or a purchase money mortgage. To do this, to
2 decide what type of transaction it was, you are going
3 to have to look not only at the documents themselves,
4 but you are going to be asked to decide what the
5 intention of both parties was in entering into this
6 transaction; whether it was defendant's intention to take
7 a loan of money from plaintiff, and, more particularly,
8 and more importantly, whether it was the plaintiff's
9 intention to make a loan of money to the defendant or
10 to lease him equipment or to sell it to him conditionally.
11 I am fairly certain at this point in this case
12 that you will hear the word "Loan". You will hear the
13 word "Interest" from defendant's witnesses as their
14 testimony proceeds, but even as Mr. Arisohn states,
15 we ask you to look not only at defendant's unilateral
16 intention. He could say that he thought he was going
17 to take a loan, but look at the intention of both
18 parties, what is this transaction as they both intended
19 it to be, particularly the plaintiff's intention.
20 Now, you will see from the documents in question,
21 the main documents in question -- these two documents,
22 they are firstly, they are termed leases, and the payment
23 they called for is termed guarantors and we will concede
24 that's not conclusive as to what the transaction is
25

1 but please don't disregard it, because after all these
2 are the documents which both parties signed; and in
3 addition to that we are going to prove to you Mr. Hendrix
4 never received any monies directly from plaintiff,
5 National Equipment Rental; that he requested National
6 Equipment Rental to buy these two pieces of equipment,
7 one from Western Car Tractor Company, the other from
8 Jeff Hunt Machinery Company and to lease it to him.
9 We are going to show that those two vendors,
10 Western and Jeff Hunt issued their purchase order --
11 I'm sorry -- issued their invoices based on plaintiff's
12 purchase order to them for the purchase of this equip-
13 ment, and that the plaintiff, National Equipment there-
14 after issued its check in payment of the purchase
15 price of this equipment.
16 We are going to show you that the invoices
17 stated what the purchase price was. There was no
18 indication in the transactions between plaintiff and
19 the other two vendors of Mr. Hendrix' alleged interest
20 at all that this was supposed to be a forwarding of
21 loan of money to him. These were invoices plain and
22 simple.
23 We are also going to attempt to show you that
24 Mr. Hendrix knew all along exactly how this deal was
25

being consummated. He knew, he requested the purchase of equipment; he requested that it be leased to him and he signed the document calling for rental payments at regular -- even monthly payments, the same monthly payments every month.

Again as I said Mr. Hendrix will use the term Loan, he'll use the word interest in his testimony. I am sure in your looking at the intent of the parties please pay particular attention to what the evidence shows that the plaintiff, National Equipment knew about the transaction when it purchased this equipment, what it knew about Mr. Hendrix' interest and desire, because it is the plaintiff's intention whether or not plaintiff intended to make a loan or plaintiff intended to enter into a lease or security agreement, it is really all important in your determination of whether or not these transactions are loans or some other transaction. Thank you.

THE COURT: Now, the defendant has the burden of proving that this was a loan -- the defendant's intention. They have a burden of proving it. If they prove it, they won't have to pay anything further, so the plaintiff who normally would go first in a trial is not going to go first; the defendant will call

the first witness.

MR. ARISOHN: Thank you, your Honor.

I would like to read certain stipulations that Mr. Polleck and I have entered into.

THE COURT: Now, a stipulation is an agreement between counsel and their clients that facts now being stated are true, so we don't have to have evidence on it.

MR. ARISOHN: I am going to read a series of statements and facts. There is no proof as to these particular aspects of the case.

First two documents in this case designated as leases from the subject of this action were executed by the defendant, H. Walter Hendrix, the third; second, that the said documents were physically executed by the defendant H. Walter Hendrix, the third, within the State of South Carolina and were accepted in writing by plaintiff in its office in New York State.

Third, that as to documents designating "Lease Number 50-2058", dated April 30, 1974, defendant H. Walter Hendrix, the third, made three payments and no payment was made after the payment credited to the said defendant on September 5,1974.

That as to document designated "Lease Number 50-205B" dated June 11th, 1974, the defendant, H. Walter Hendrix, the third made four payments called for by said document and no payments were made after the payment credited on September 5, 1974.

Next the rental rates or charges requested by plaintiff as lessor are determined in part by the use of interest or rate factor tables applied to plaintiff's cost of the equipment.

THE COURT: Wi ll you show the jurors to the jury room? Why don't you take a few minutes to relax, get your things put away and we will come back in five minutes.

(Whereupon, a short recess was had.)

G E R A L D J A C O B S, called as a witness, was sworn by the Clerk of the Court and testified to as follows:

DIRECT EXAMINATION

BY MR. ARISOHN:

MR. ARISOHN: May I proceed, your Honor?

THE COURT: Yes.

Q Mr. Jacobs, you are employed byNational Equipment Rental?

A Yes.

Q You are the secretary and general counsel of that

company?

A I am;now it's Vice President and general counsel.

Q In 1974, were you secretary and general counsel?

A I may have been, yes.

Q And haven't you been general counsel since 1972?

A Yes.

Q Am I correct, Mr. Jacbos, that as general counsel and secretary of National, in 1974, that you were in charge of and responsible for the Legal Department of National Equipment?

A Yes.

Q And as part of your responsibilities, you advised the company, that is National Equipment of its day to day legal matters?

A Yes, sir.

Q And that, together with other senior management, you were involved in a day to day policy decisions of National Equipment?

A Yes.

Q Am I correct that you have been in the business similar to National Equipment for about ten years?

A I have been with National over ten years.

Q Let me show youwhat has been marked previously as plaintiff's exhibit one and two, which are in evidence, and

ask you whether you participated in the drafting of these agreements?

A Yes.

Q And am I correct on plaintiff's exhibit two, which is the agreement, dated June 11, 1974, between your company and Mr. Hendix, that you were the signator on behalf of National Equipment Rental?

A Yes.

Q Let me show you, Mr. Jacobs what has been previously marked plaintiff's exhibit 3 and 4, and ask you with respect to exhibit 3 and 4 whether you participated in drafting those documents?

A On exhibit 3 I did not participate in drafting this document. It had already been in existence when I had come to National.

On exhibit 4 I did help prepare the draft for that.

Q Am I correct that exhibit 3 is an Option Agreement which entitled Mr. Hendrix the option of purchasing the equipment which is the subject of one of these agreements at the end of the term of that agreement?

A That is correct.

Q Am I correct, exhibit 4, the one that you did participate in drafting is entitled a Purchase Agreement which permitted National at its option to require Mr. Hendrix to

purchase the equipment which was the subject of the other agreement in question here?

A That is correct.

Q Am I correct, Mr. Jacobs, that National is a wholly owned subsidiary of the -- I withdraw that.

Am I correct that the North American Car Corporation is a subsidiary of the Tiger International, Inc?

A Yes.

MR. POLLECK: If your Honor please, I know Mr. Jacobs is a hostile witness --

THE COURT: It doesn't make any difference of who is rich, who is poor, who is big or who is small, everyone is equal in this court. The fact that this corporation may be owned by somebody who trades on the Stock Exchange has nothing to do with it, we treatevery-body the same here.

MR. ARISOHN: The purpose of my question is that I need that in the record in order to introduce an exhibit.

THE COURT: I am not criticizing.

DIRECT EXAMINATION

BY MR. ARISOHN: (CONTINUING).

Q Mr. Jacobs, the agreement in question here dealt with pieces of heavy construction equipment; is that

correct?

A Yes.

Q Isn't it a fact that National does not deal only in pieces of heavy construction equipment?

A That is correct.

Q They deal in all sorts of products and equipment and machinery?

A That is correct.

Q And in computers?

A Yes.

Q And aircraft too?

A Some aircraft, yes.

Q And isn't it a fact that with respect to computers, National Equipment has a Division set aside only for dealing with computers?

A Yes.

Q And also a Division for dealing only with aircraft?

A That is correct.

Q And all other equipment which National Equipment deals with is in the third division called the Finance Division?

A That is correct.

Q Your offices are located in Lake Success, Long Island?

A Yes.

Q Does N ational have other offices around the Country?

A Yes.

Q At any of those offices, sir, am I correct that National has no showroom?

A It has an office.

Q Am I correct that it has no showrooms?

A It has nothing to show, no showrooms.

Q Am I also correct that it has no catalogue?

A No catalogues.

Q Am I also correct that it has no inventory?

A Its only inventory is money.

Q Am I correct also, that National has no facility for making repairs to any of the equipment that it deals in?

A That's correct.

Q Calling your attention to plaintiff's exhibit 2, which is the agreement, your company entered with Mr. Hendrix on June 11th, 1974, a second agreement; am I correct that the agreement is related to a Caterpillar tractor?

A That's what the agreement says.

Q And under the terms of the agreement Mr. Hendrix was required to pay to your company $2,744.39 per month, plus tax for forty-two months?

A That is correct.

Q Prior to affixing your signature to this agreement, Mr. Jacobs, did you have occasion to inspect the equipment which was the subject of this agreement?

A No.

Q Calling your attention to plaintiff's exhibit one, which is an agreement between Mr. Hendrix and your company, dated April 30, 1974, am I correct that the equipment which is the subject of that agreement was an International Power Shift tractor?

A That's what it says.

Q And that Mr. Hendrix was required to pay your company $866.29 per month plus tax for 49 months?

A Yes.

Q Did anyone from your company inspect the equipment which is the subject of this agreement, prior to your company enforcing this contract?

A I don't know.

Q With respect to the April 30th contract, which is the one involving International Tractor, am I correct, Mr. Jacobs, that your company advanced funds to a company owned, Western Carolina Tractor Company prior to entering into this agreement with Mr. Hendrix for $31,161.62?

A No.

Q Let me show you what's been marked defendant's exhibit K in evidence and checked byyour company to Western Carolina Tractor Company in that amount.

A Yes; dated after the contract.

Q And amI correct that the $31,161.62 which your company forwarded to the Western Carolina Tractor Company was the basis upon which your company arrived at a monthly payment Mr. Hendrix was to make to your company?

A That is correct.

Q Calling your attention now to the second transaction, the one dated June 11th, 1974, and showing you what has been previously marked and introduced into evidence, defendant's exhibit O, which is a check from National Equipment Rental to the Jeff Hunt Machinery Company $84,442.74, I ask you is that the check, or is that a copy of the check by which your company forwarded funds to the Jeff Hunt Machinery Company, and is that amount the amount upon which your company based and calculated the monthly payments that Mr. Hendrix was to make to your company?

A That is correct; that's one of the amounts.

Q Is it also a fact, Mr. Jacobs that following the transactions and the executions of the contract which are at issue here, your company paid a sum of money to a South Eastern Capital Company and a Robert Kelly jointly in the

amount of $2,437.00, and also paid Allen Spezen an amount of $5600.00. Let me show you what has been marked defendant's exhibit B and C?

A That's correct.

Q And are those copies of the checks by which your company paid those amounts?

A That is correct.

Q And isn't it a fact that your company paid these amounts to these peopleas a finder's fee for putting your company together with Mr. Hendrix?

A That is correct.

Q Now, going back to the option and purchase agreement that you testified about previously. Am I correct, Mr. Jacobs, that with respect tothe purchase agreement, that document required Mr. Hendrix to purchase the equipment which was the subjec t of that document at the end of the terms of the contract?

MR. POLLECK: Your Honor, the document speaks for itself. He already asked him this question once before. I think he answered it adequately.

THE COURT: I'll permit it.

A If Mr. Hendrix did not opt to purchase the equipment then National could require him to purchase it at the end of the lease.

Q Am I correct with respect to the equipment which is the subject of the Purchase Agreement your company had no interest in the equipment following the turn of the contract in question?

A No, you are not correct.

Q What was the intention of your company, Mr. Jacobs, in making Mr. Hendrix this one instance, sign option to purchase and then requiring him in the other instance to sign what's called a Purchase Agreement,which you testified was a document which required him to purchase the equipment?

A The difference between the two is that onthe both of them we owned the equipment; that at the end of the agreement if the market was such that we felt we could sell it elsewhere and get more money we could do that, or on the other hand we could have requested Mr. Hendrix to purchase the equipment or he could opt it to purchase the equipment under that.

Q During your attention only to the Purchase Agreement, isn't it a fact that on that document you could have required Mr. Hendrix to purchase that equipment even if he did not want to?

A That is correct.

Q Under the terms of the two contracts, the April 30th contract and the June 11th contract, Mr. Jacobs, isn't it a fact that Mr. Hendrix was required to pay the use

taxes on the equipment which was the subject of those contracts.

A He was required to pay the use taxes on the rentals.

Q To your company?

A To our company who would then remit it to the proper tax authority.

Q And he was also required to bear whatever risk of loss there was on that agreement; am I correct?

A That is correct.

Q In other words, if anything happened to the equipment, if there was damage to the equipment, Mr. Hendrix would pay for the repair of that equipment, not your company?

A That is correct.

Q Mr. Hendrix was also required to have insurance on these pieces of equipment, was he not?

MR. POLLECK: This is all in the document. Mr. Arisohn is just asking the witness what's in the document.

THE COURT: I'll permit it to a limited degree. The jury can all read, we'll give them the document and they can read it over the lunch hour. You may answer that question.

DIRECT EXAMINATION

CONTINUED BY MR. ARISOHN:

Q Was Mr. Hendrix required to pay any insurance on these pieces of equipment?

A Yes, he was.

Q Showing you what has been marked in evidence as defendant's exhibit I, and Il, are these copies of financing statements which your company filed shortly after the agreements were executed with respect to these two pieces of equipment?

A Yes.

Q Am I correct that shortly after the contracts the agreement here in question were executed your company sighed those contracts as security interest or as collateral to secure your company's own credit from another bank?

A That's correct.

Q Drawing your attention to the monthly amounts that Mr. Hendrix was to pay under these two contracts, the $866.01 and the $2744 on the other; you testified before that those amounts were arrived at based upon the amount that your company paid to Western Carolina Tractor Company and the Jeff Hunter Machinery Company; is that correct?

A That is correct.

Q And isn't it a fact that your company arrived at Mr. Hendrix' monthly amounts by applying to the cost to your company of the equipment and interest rate or a rate or

a factor?

A We applied one of those things to it, yes.

Q And isn't it a fact that the rate or interest rate you applied was derived as a certain percentage over the then prime interest rate?

A No.

Q Do you recall testifying at a pretrial deposition on October 31, 1975?

A I recollect the pretrial examination.

Q Do you recall being asked these questions and giving these answers -- at page 36, Mr. Polleck?

"Question: How did the salesman know he's supposed to come up with $27.80 per thousand; is he told that by the company?

"Answer: No, he's told that he has to come up with some sort of rate and he works out rates within that structure, whatever it is.

"Question: How does he know that he's supposed to get a rate?

"Answer: Well, it depends. At one time we were working on approximately a certain percentage over the prime rate.

"Question: Of interest?

"Answer: That's a base which we use.

"Question: So your figure here, $27.80 per thousand, is that based or connected with prime rates of interest?

"Answer: In some.

"Question: An amount over the prime rate of interest?

"Answer: To determine your rateof return you are using that as a base".

Do you recall testifying that way?

A That is correct.

Q By the way, prior to entering into the agreement with Mr. Hendrix, am I correct that your company performed a credit check on Mr. Hendrix?

A I believe they did.

Q That's the standard practice of your company?

A That is correct.

Q Let me show you what has been marked exhibit J and M, which are in evidence, and ask you if those are what is known in your company as LIP Sheet and ask you if those are the internal documents which are used to process a "Lease" in your company?

A That is correct.

Q Drawing your attention to the box on the sheet in the upper right hand corner, there is an entry next to the

interest word prime date -- it's 11.5. Am I correct that that indicates the then prime interest?

A That is correct.

MR. ARISOHN: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. POLLECK:

Q Mr. Jacobs, are you familiar with how the regular charges that appear on the document you have seen, exhibits 1 and 2 are arrived at by National Equipment Rental?

A Yes.

Q Would you tell us please, briefly in narrative form, what factors go into the determination of rental charges, and how this so-called prime rate is involved in that determination?

A The factors that go in first of all is the cost of the equipment; to do that -- and this is where the prime rate comes in -- we have to figure in what we pay for the money that we borrowed and effectively National would pay a certain percentage above the prime rate so that is another factor that goes in. In addition, that is our cost and overhead and expense of running the operation, salesman's commission, salaries and what not; so all of that is put into sort of one basket and from that we determine what we would need for the rental to give us a certain return over the years.

Q Mr. Jacobs, as far as the rental rates for these particular pieces of equipment, that is $866.00 per month for 49 months in one case, and the $2,744.39 for 42 months in the second case -- firstly, are you familiar what the usual and rental rates of this type of equipment was in the industry in 1974?

MR. ARISOHN: Objection, your Honor.

THE COURT: I'll permit it.

A Yes.

Q Mr. Jacobs, how wouldyou say that these rates compare with those general rental rates in the industry?

A At that time they were about equivalent; in some cases a little lower; in some cases a little higher.

Q Mr. Jacobs, as far as these pieces of equipment go,the International tractor and the Capitol tractor and Scraper, are you familiar with the tax agreement by National on its tax returns as to equipment such as this in this type of transaction?

A Yes.

Q And does National Rental depreciate this equipment for income tax purposes?

A Yes, it does.

Q Do you know what percentage of any of the rental charges called for are recorded as income for income tax purposes?

A We report the full rental.

Q Now, Mr. Jacobs, it's been brought to your attention and it appears in the document that there was a tax that had to be paid in addition to the dollar rental value stated. What type of taxes; do you know?

A Most of your states charge a tax on the rental, so for example, in New York, if your rental is $100.00 per month you pay an additional eight percent, another $8.00, which has been submitted to the taxing authority.

Q And as far as you know, Mr. Jacobs, as general counsel for National, do you know of -- have you come across any kind of states that charge any tax on a loan?

A Not to my knowledge.

Q What does National do when it collects tax on each monthly rental?

A It collects it and submits a monthly tax report to that taxing authority and pays the tax.

MR. POLLECK: All right, thank you. That's all the questions I have.

REDIRECT EXAMINATION

BY MR. ARISOHN:

Q Did you bring copies of those tax returns, Mr. Jacobs?

A No.

Q It is a fact that the State of South Carolina charges a use tax on the sale of equipment too, does it not?

A It may. As most other states that would be a sales tax, not a use tax.

Q Are you unaware that the State of South Carolina imposes a use tax on the sale price of personal property in the amount of four percent?

A I have no idea.

Q You testified that you were aware of what usual rentals were in the industry for these types of equipment in 1974; is that correct?

A That is correct.

Q Will you tell us how many pieces of heavy construction equipment that your company was involved in in 1974, limiting your answer to scrapers and tractors?

A I couldn't tell you that.

Q Ten; one?

A I couldn't even venture a guess.

Q No idea at all?

A No, because the rentals as in the industry of the leasing field is not geared toward the particular equipment. The rental rates are structured in relation to the cost of any equipment that we may put on the lease.

Q Am I correct that the rental rates then would

be structured the same no matter what the equipment was?

A That is correct.

Q And it's based only upon the cost of your company of the amount of money your company has to outlay?

A That would be correct.

Q And that when youtestified before that your rental rates for this piece of equipment was equivalent to the rate in the industry, was the rate that you applied toward the cost of the equipment?

A That is correct.

Q You didn't mean to imply that the rate that your company was charging Mr. Hendrix for these particular two pieces of equipment was equivalent throughout the industry for these particular pieces of equipment?

A That is correct.

Q Isn't it a fact that you are talking about what the cost of lending money is throughout the industry?

A Absolutely not.

MR. ARISOHN: Nothing further, your Honor.

THE COURT: That's all.

What we'll do is let the jury go out to lunch, but I would like you to do is get together all of the documents that the jury is going to have to examine so they could read them.

They don't have to read them here in the courtroom.

MR. POLLECK: I then offer six or seven copies so -- I do not have the LIP sheets that Mr. Arisohn reintroduced and I don't have the financing statement.

THE COURT: Well, do you have?

MR. POLLECK: I have copies of the main agreements themselves, the ones that are called leases; I have the options to purchase and the purchase agreement in each case. I have the purchase ordersfrom t he plaintiff to the vendors; I have the checks from the plaintiff to the vendors; I have the invoices from the plaintiff to the defendant; that's it.

THE COURT: That will be very helpful. Pass those to the jury.

MR. ARISOHN: May I add to that, the LIP Sheets that I referred to and the financing --

THE COURT: Can't you do that during the lunch hour, get them photostated.

How many copies does the plaintiff have?

MR. POLLECK: I have eight. I would like to keep one for myself.

THE COURT: While they are at lunch or during recess each one of them can read it. This will help us

much more quickly. If you will be back at 1:10. When you read these documents, don't explain it to each other. Read it quietly and the lawyers will explain what needs to be done in the courtroom.

All right, enjoy your lunch, be back here at 1:10, please.

Counsel will remain for a moment.

(Whereupon, jurors were excused for the luncheon recess.)

THE COURT: Now, I have had xeroxed as Court exhibit five, the Charge of the Court in National Equipment Rental, Ltd, vs. Stanley, 283 F.2nd, 600, 2nd Circuit, 1960 for the aid of the parties, and the Court of Appeals, should it be necessary; I sent and got the original record.

I have also xeroxed, as I told you I would, this very fine memorandum from Raymond Troche, to incorporate my view, but which I say I am not going to incorporate. The clerk will put it in the file, so that you may look at it and use it as you wish.

MR. ARISOHN: There is one other matter which I guess we ought to take up now, that is a document which I have marked defendant's exhibit Z for identification, and instead of introducing that in the presence of the

jury --

THE COURT: What is it?

MR. ARISOHN: Certified copy of the company's F.E.C.10K. On page 25, your Honor, the business is described as following: National Equipment writes two types of leases, finance lease and operating lease; finance lease is returned to National Equipment Rental during their non-transferrable original term; National invoice cost of the equipment plus interest charges, related expenses and a profit oninvestment. I would seek to introduce that statement as an admission of the company that they are getting in interest charges.

THE COURT: No, you can use that in connection with your cross-examination of the Vice President, Mr. Jacobs if you want to, but it's set out for a different purpose. I am not going to allow it. I don't want this whole big document.

MR. ARISOHN: I would seek only to introduce this page.

THE COURT: You can cross-examine him and question him if you want to recall it, but it has a very narrow meaning in the context of F.E.C.'s requirements, and I think the witness ought to explain it.

MR. ARISOHN: I would also seek to introduce

page 30 -- excuse me your Honor -- page 30, where National Equipment Rental details what its commission is in the following language: "All of the leasing activities in which National is engaged are highly competitive. National presently competes with many existing organizations engaged in the same type of business and other concerns including banks. And nationally known finance companies have entered or expect to enter the field in the near future."

THE COURT: If there is an objection, use it in the same way. You could recall him with it and ask him, does that indicate that that is a loan or whatever you want to ask him.

MR. ARISOHN: I feel certain that I can't expect a positive answer on that.

THE COURT: But you can before the jury.

MR. ARISOHN: I would also seek to introduce pages 18 and 23 of the previous years 10K which has the identical language.

THE COURT: I'll rule the same way. I think it would be confusing and misleading and pursuant to my discretion under Rule 403, while there is some relevance, I think the prejudice of introducing that document far outweigh the possible probative value.

1 MR. ARISOHN: Thank you,your Honor.

2 (Whereupon, luncheon recess was had.)

3 (After recess.)

4 THE COURT: Bring in the jury.

5 (Whereupon, the jurors entered the courtroom and

6 are now seated in the jury box.)

7 THE COURT: The witness is being recalled for

8 a few questions.

9 (The witness resumed the witness stand.)

10 REDIRECT EXAMINATION

11 BY MR. ARISOHN:(CONTINUED):

12 Q Mr. Jacobs, do you agree that the payment which

13 National Equipment received from Mr. Hendrix under the terms

14 of the agreement in question here, consisted of certain

15 components, one of which was an interest charge?

16 A I don't understand the question; interest

17 charge for whom?

18 Q Let me rephrase the question.

19 Mr. Hendrix paid you a certain amount every month; is

20 that correct?

21 A That is correct.

22 Q Do you agree of the amount that Mr. Hendrix paid

23 you a certain amount of that money represented an interest

24 payment?

25

1
2 A No.
3 Q You disagree with that?
4 A That is correct.
5 Q Do you agree that the payment which Mr. Hendrix
6 was required to pay you, a portion of that payment represented
7 an interest charge to Mr. Hendrix?
8 A Absolutely not.
9 There was no interest charge to Mr. Hendrix.
10 Q Are you aware, sir, that a document your company
11 filed with the Securities and Exchange Commission in 1974,
12 in describing your company's business, the following statement
13 appeared; "---
14 MR. POLLECK: Your Honor, I don't know what
15 Mr. Arisohn is about to read, but he is reading from a
16 document and asking Mr. Jacobs if he is aware of it.
17 THE COURT: You know what he's going to read,
18 he just showed it to you.
19 MR. POLLECK: I object to its relevancy.
20 THE COURT: I ruled already.
21 He may ask the question for the reasons as
22 stated.
23 MR. ARISOHN: Thank you.
24 Are you aware that the following statement was
25 made in a document your company filed with the S.E.C.

1 in 1974.

2 "National Equipment Rental writes two types of

3 leases 'finance leases' and 'operating leases'"

4 A Yes.

5 MR. ARISOHN: Now I move the introduction of that

6 into evidence.

7 THE COURT: Denied.

8 You read from what document for identification?

9 MR. ARISOHN: Z for identification.

10 RECROSS-EXAMINATION

11 BY MR. POLLECK:

12 Q First of all National writes two kinds of leases,

13 which kind of lease is represented by exhibit one and two?

14 A Finance leases.

15 Q Will you explain to us what interest charges

16 represents to whom that interest is charged?

17 A That whole sentence states what I testified to

18 before; that the return on the lease will bring into focus the

19 following, the payment, the interest or charges that National

20 Equipment Rental pays on the money that it borrowed to run

21 its business. The related expenses, salesmen, overhead and

22 all other salaries. That's what that sentence means.

23 Q Interest charges it relates to a charge to

24 National which is part of its expense and overhead?

25

A That's correct.

MR. POLLECK: Thank you, that is all.

THE COURT: Step down.

Next witness.

MR. ARISOHN: The defense calls Mr. Hendrix.

H E N R Y W A L T E R H E N D R I X, the 3rd, was called and sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. ARISOHN:

Q Mr. Hendrix, where do you reside?

A I live at Route #10, Lexington, South Carolina.

Q Where is Lexington, South Carolina?

A Small community about 12 miles from Columbia, South Carolina.

Q How large is that community?

A Lexington is about 2,000 population I live in a rural route.

Q How long have you lived there?

MR. POLLECK: Again, the question of relevancy to the transactions in questions are beyond me.

THE COURT: He's entitled to introduce himself to the jury. You may continue.

DIRECT EXAMINATION CONTINUED

BY MR. ARISOHN:

Q How long have you lived there?

A All my life.

Q Are you married?

A Yes, I am.

Q Is your wife Jean Hendrix sitting with you?

A Yes, she is.

Q How long have you been married?

A Twenty years.

Q Do you have any children?

A Yes, we have.

Q How many?

A I have two; a boy 18, and a girl 14.

Q Tell the jury what your educational background is?

A I have a high school education, Lexington.

Q Did you work while youwent to school?

A Yes, my daddy was disabled.

MR. POLLECK: This is prejudicial to the issue involved.

THE COURT: The jury may find it helpful in determining, understanding. I don't want you to use this in a prejudicial way, everybody is equal.

Q You may continue.

A I was the oldest son in the family and it was my

job to support the family.

Q Tell the jury and his Honor when you first became involved in the construction business?

A About 1959 I bought a $700.00 little small bulldozer and I repaired it in my spare time and I got some odd jobs doing some site cleaning for new houses and some land scape grating work where we clean up the trash and we grade the ground so the water would run away from the house rather than towards the house.

Q Between the period of 1959 and 1973, is it fair to say the street grading became your primary occupation?

A Yes, we worked for a large house building company and they used me not only to do their lot clearing and landscape, but they let me go out and do some grading for the work and install storm drain pipes for the water control.

Q During this period of time, from 1959 to 1973, did you have occasion to purchase new and used heavy construction equipment?

A Yes,sir.

Q Did you also have occasion to purchase new and used heavy construction equipment?

A Yes, sir.

Q Did you also have occasion to sell used construction equipment?

A I didn't have a need for it. I would try to get hold of what I need.

Q As a result of your experience in the construction industry, did you become familiar with the quality and value of used construction equipment?

A I would say so, yes.

Q Calling your attention to 1973, Mr. Hendrix, did you form a company at that time?

A Yes.

Q What was that company?

A H. Walter Hendrix Construction Company.

Q Were you the only principal of that company?

A Just aprivate owner; that's right.

Q What kind of work were you doing at that time?

A Well, we still did pretty much the same thing. We cleared off the site, like some one was going to build a house on a particular site, we removed the trees and the stumps; we graded it according to the type of house that it was going to be and we cleared out the driveway site, and then when the house was completed, we cleaned up all of the construction debris and graded it there again and hand raked it so you would have a permanent lawn, and we would help clear in grading some of the street work. They would use some of our men for that work.

Q In 1974, Mr. Hendrix, did you in your work have occasion to come to need an International Harvester tractor bulldozer and a Caterpillar scraper?

A Yes.

Q Tell the jury what those pieces of equipment are and what they look like.

A Well, a bulldozer, International Harvester bulldozer is a crawler tractor with steel tracks that maneuvers real short, turns in close places and it is used for pushing up stumps, trees, moving or pushing earth from one site to another site just to clear; and in grading the Caterpillar scraper as rubber tires, two in the front and two in the rear and it picks up earth from a high spot and is used to move at sometimes short distances, sometimes maybe several blocks in dumping, what you call sealed. In other words, it is an earth mover, pick up the earth and move it to another spot.

Q Could you give the jury some idea how large these pieces of equipment are?

A The bulldozer weighed about, I would just guess, probably 20, 25 tons; that Caterpillar scraper too large to haul on -- it probably weighed about, I would say 35, 40 tons.

Q You testified that you had occasion to need these two pieces of heavy equipment.

Tell the jury how you went about getting them?

A Well, I went to Western Carolina Tractor Company at first for the bulldozer. We made a monthlyarrangement where I paid them $2,000.00.

MR. POLLECK: I object. He's testifying to an arrangement between himself and another party. There is no evidence that -- the written arrangement is not before the Court. I don't think that he should be able to testify to it.

THE COURT: It may help the jury understand what was in his mind. Continue.

A (Continuing) -- It was about a $50,000 bull dozer. I didn't have the cash and capital to pay for it in cash, so they wanted to sell the bulldozer and I had need for it. I was trying to use this equipment to make my living. They made an agreement if I paid them $2,000 per month I would have use of the bulldozer and they gave me credit of that $2,000.00 if I had it for six months.

MR. POLLECK: Objecting on the same grounds.

THE COURT: I 'll allow it.

Q You may continue.

A At any time I could get longer term of financing it would be less than $2,000 a month. They would give me full credit for what I paid --

MR. POLLECK: This is outright hearsay.

THE COURT: Just use this to determine the state of mind of this defendant and not the truth of what he says.

Q Did you have a similar arrangement, Mr. Hendrix, with respect to the Caterpillar Company and the scraper that you needed?

A That is ri ght, it was a hundred and two thousand -- a hundred three thousand, of which I didn't have the cash money, but I had worked for it and I had an opportunity to pay for it, so they made arrangements with me that I pay them $5,000-

Q Who were you paying?

A Jeff Hunt.

Q Who are they?

A The Caterpillar dealer, just like a car dealer.

Q What was the arrangements that you had with the Caterpillar Company?

A I paid them $5,000 a month plus they charged me $200 in sales tax because the law is if you pay for it in monthly payments you in fact are buying it. You have to pay the State the sales tax which is four percent, but anyway, they had arrangements any time I could get a longer time financing--

MR. POLLECK: Your Honor, again he's testifying to outright hearsay. He already testified to this and I

1 think for the purpose your Honor is letting it in,
2 it's already been brought before the jury.
3 MR. ARISOHN: This is with respect to the
4 other contract, your Honor.
5 THE COURT: With the same limitation, not the
6 truth of it was done, but to show what the person's
7 state of mind is, if you think that it is helpful.
8 A There again, I didn't have the money to pay cash,
9 but I could pay the $5,000 a month. It was awfully hard at
10 any time I could get long term financing,long term loan, if
11 I could get a loan for lesser payment, they would give me
12 credit. If I had it for six months and I paid as much as
13 $30,000 down they gave me credit for that month because some-
14 times a scraper -- I would not use it for ten hours a month.
15 I was paying on the machine. I was paying my sales tax,
16 so any time I could get a loan to finish paying for it, they
17 would give me sole and total credit in both companies.
18 Q Do you recall how many payments you made to
19 the International Harvester dealer and how many payments you
20 made to Jeff Hunt, the Caterpillar dealer?
21 A I paid Western Carolina Tractor approximately
22 $31,000 and I paid Jeff Hunt $83 or $84,000.00.
23 Q Do I understand you to say that you then owed
24 the International Harvester dealer on that piece of machinery
25

some $31,000.00 and you owed the Caterpillar dealer some $84,000.00?

A That is correct.

Q Did there come a time when you were making the payments to these two companies that you no longer could make those payments?

A Yes, that's right; things were relative and we were having a terrible time collecting the money. People couldn't pay us, they were going bankrupt and I had a lot of equity in the machine. I paid a lot of hard money. All I used it for was eight, ten hours. Inflation was to the point where --

MR. POLLECK: Your Honor, object to all this, this is irrelevant.

THE COURT: Well, I'll allow it on the same basis, only to show state of mind,not the truth of it.

Q Mr. Hendrix, answer my question precisely. Did there come a time when you no longer could afford to make the payments to the Western Carolina Tractor and Jeff Hunt Machinery Company?

A Yes, it was a terrible strain.

Q The answer is yes.

A I couldn't continue making them at that time.

Q What,if anything, did you do to help that situation

1 out?

2 A Reed Hanna contacted me.

3 Q Who is Reed Hanna?

4 A He was the equipment salesman -- the salesman

5 for the bulldozer.

6 Q Did you tell Mr.Hanna that you no longer could

7 make the payments to his company?

8 A I told him that I needed longer financing arrange-

9 ments so that my payments wouldn't be nearly as --heavily--

10 immediate every month.

11 Q What, if anything, did he do?

12 A He thought that he had some arrangements worked

13 out.

14 Q Mr.Hanna contact you again?

15 A Yes, he did.

16 Q And what happened, if anything?

17 THE COURT: Now, you understand, ladies and

18 gentlemen, that what this witness said to some third

19 party is absolutely hearsay so far as the plaintiff is

20 concerned. The plaintiff wasn't there, he didn't hear

21 that conversation, he didn't hear the word "Loan"

22 mentioned, and I am only allowing this for the limited

23 purpose of showing what was in this witness' mind; is

24 that clear?

25

This plaintiff was not there at that time, didn't hear any of this discussion, if it took place. That's for you to determine.

Q Did Mr. Hanna contact you again?

A Yes, he did.

Q What, if anything happened when he contacted you again?

A He brought Mr. Robert Kelly.

Q Who is he,sir?

A He was with South Eastern Loaning Company, or some kind of financing company, South Eastern Company.

Q Was he representing anybody?

A Well, he had the National Equipment papers, documents already presigned by officers of National with him when they came to me with Mr. Pozen, he and Hanna together.

Q Did he indicated whether he was representing National Equipment?

A That was my understanding.

Q What took place at this meeting between yourself and Hanna and Mr. Kelly?

A Well, I asked him whetherhe was with the company whoI know he used to be associated with, he said in this arrangement he had arangements worked out with National.

Q Did he discuss what those arrangements were?

A They showed me a paper and the first thing they asked me and my wife, both had to sign it, I couldn't understand why my wife had to sign it. She never had any credits banded in her life.

Q Did Mr. Kelly discuss with you what the documents he had with him from National were?

A He said that it was a leasing agreement, which I asked him. I said, "Isn't that for somebody making a lot of money that needs a tax write-off on a particular job, makes a lot of profit and needs to write-off for the Government." In my case, I need a long term loan, something less than five thousand two hundred and something less than two thousand dollars a month. I didn't need no tax write-off. I already lost enough money, I needed to be able to keep the equity and the money and the collateral equipment because I, at that time, had a job that I could be paid once a week on hopefully.

Q Is it your testimony that Mr. Kelly showed you this document which was called the lease?

A That's right.

Q What did you say to him about that? If anything?

A Well, I spoke up more than anybody else and said that it was much writing on it, we couldn't understand it all, shouldn't we get an attorney and get some advice on

it, particularly when she had to sign.

Q What was said back to you, sir?

A Well, they told me that it was a standard leasing agreement. They were both in a hurry, it was after lunch, they had people to see. They assured me that it was a standard agreement and that's the way National loaned their money. They loaned their money through a lease agreement.

Q Did you object to the lease form?

A Well, I trusted Reed Hanna, I still trust him. I had no reason to question it. It was a national loan company, big company in New York supposedly, that's the way theyloan money, I couldn't pay $5,000 and $2,000 I needed financing.

Q Did Mr. Kelly say anything about the interest rate on those agreements?

A Well, he just said that it was a standard rate in the leasing arrangements, whatever they had there, that's the way they loaned their money.

Q At the time that you executed these agreements, who was in possession of the equipment?

A Well, I was in possession. I had the scraper about five months, for five months, and I had the bulldozer five, six months.

Q At any time prior to the execution of these

1 agreements, either by you or National Equipment, did National
2 ever send anyone out to your job site to see the equipment?
3 A No.
4 Q Anyone from National ever inspect the equipment?
5 A No, not that I know of, unless this fellow Kelly
6 was supposed to. I understand that all of a sudden he showed
7 up with these papers from National. To my knowledge Pat Kelly
8 never inspected, but he came on my job, he knew that I was
9 doing this kind of work.
10 Q No one including Pat Kelly ever inspected the
11 equipment?
12 A I never seen Pat come by and inspect.
13 Q Now, aside from the two contracts which required
14 you make monthly payments, Mr. Hendrix, you also entered into
15 an action agreement and a purchase agreement which had been
16 marked in evidence as plaintiff's exhibit 3 and 4, which
17 had been provided to the jury.
18 During the term of the contract that you had with
19 National Equipment Rental, when you were supposed to be paying
20 the money on a monthly basis, what was your understanding as
21 to who, which party owned the equipment in question?
22 A It was my understanding National owned the
23 equipment and the equipment was collateral and they had the
24 equipment for security on their loan. However, when I made
25

1
2 my last payment, agreement here that I signed, it wasn't any
3 question, I wasn't going to pay all that money and then the
4 equipment was going to be there.
5 Q What was your understanding when you made the
6 last payment?
7 A They would release their mortgage and then it
8 would be mine.
9 Q How much were you to pay as a last payment?
10 A 10 percent.
11 Q Is that what you would pay under those two
12 supplemental agreements?
13 A Well, I haven't read them this quick,but that
14 was the agreement -- when I signed them.
15 Q And that was ten percent of what?
16 A Ten percent of what I owed, $31,000 and
17 10 ten percent of the 80 owed to Jeff Hunt Machinery.
18 Q What was your intention with respect to whether
19 or not you would have exercised the option and purchase
20 agreement and of the contract terms?
21 A Well, there was no question about it, it would
22 be a mighty foolish person to pay that much money in payment
23 and not have the machine back in my name because for $3,000
24 a bulldozer would probably be worth $40, $45,000, at the end
25 of that term, so now $8980, $90,000 for a scraper now is

$175,000.00 and that's been two, three years old; for $8,000 they are worth about $85,000.00. I originally had at that time, I didn't have it, but three, four hundred hours on that piece of equipment, so there was no way that I would let National keep the equipment.

Q What was your intent, Mr. Hendrix, in purchasing-- I'll strike that.

At the end of the terms of these contracts 42 months and 49 months, did you believe that the value of the equipment at that time was less than the amount you had to pay under those options for the equipment?

MR. POLLECK: Your Honor, I object.

THE COURT: I am not sure that I understand the question.

Did you understand the question?

THE WITNESS: Yes.

THE COURT: You may answer.

THE WITNESS: I would think that it certainly be worth a lot more than the ten percent. It would be worth $85,000 because a new one right now is worth $175,000.00.

There is no way that I would let the equipment go back at that price, it's just starting its life span for that short period of time.

MR. ARISOHN: No further questions.

THE COURT: Are you going to read from a deposition?

MR. POLLECK: I don't know at this point.

CROSS-EXAMINATION

BY MR. POLLECK:

Q Mr. Hendrix, you say it was Mr. Reed Hanna who you knew to be a salesman for Western Carolina Tractor Company that arranged this deal for you; is that right?

A Well, he knew that I either had to pay him short term payments or $2,000, or either I had to get some financing from somebody to pay him off.

Q And it was he who brought Mr. Kelly to you?

A Yes, sir.

Q And you knew that Mr. Kelly was connected with this MR or PM Company, whatever it was?

A He had been at one time. At the time they came to my office, but he had National papers with him, he was the one that brought the National papers.

Q But you didn't know who he was connected with?

A I assumed that he must have been in some way connected with National. I didn't really ask him.

Q You didn't ask him that?

A He had National papers.

I am sure that he must have been representing them. He made the arrangements and contacted the people with National concerning these papers.

Q Did he say that he was with National Equipment Rental; yes or no?

A Sir, I couldn't answer one way or the other whether he said it. I don't recall a yes or no answer on that. All I know he had in his presence National papers and he had been in communication with them. I didn't ask him a lot of these personal questions.

Q Mr. Hendrix, in any case, prior to your signing plaintiff's exhibit 1 and 2, which I'm going to show you now, prior to signing those agreements -- in any case, you never spoke to anyone that you knew to be connected with National?

A I spoke to Reed Hanna and Pat Kelly in our office.

Q Whose office?

A We have a house trailer.

Q So you spoke to Reed Hanna salesman from Western Carolina and Mr. Pat Kelly who Mr. Reed Hanna brought to you.

A Right.

They brought the papers to us and asked us to sign them.

Q And you never communicated directly to anyone you knew to be connected with National, your desire to make a loan, did you?

A Not myself, no.

Q You never communicated to National directly or anyone you knew to be connected with National the facts that you had the equipment in your possession at the time you signed these agreements?

A Repeat that.

Q At the time you signed those agreements, you never spoke to anyone whom you knew to be connected with National and told them that you already had this equipment in your possession?

A Mr. Polleck, if a man comes to you and brings these documents --

Q Please answer the question.

A I knew they were connected.

Q You knew who was connected?

A Pat Kelly and Reed Hanna.

Q You knew Mr. Kelly was connected with them?

A Had to be or he wouldn't have the papers with him.

Q Did you know that Mr. Kelly had an interest in National?

A Pat Kelly told me that he had arranged it with National. He had arrangements worked out through some people, I don't know who all she went through, but he's the one that

brought the papers.

Q Other than Mr. Hanna and Mr. Kelly, did you tell any one else connected with National that the tractor and soon, that all of this equipment was already in your possession?

A They knew that it had been in my possession for months.

Q Did you tell anyone other than Mr. Kelly or Mr. Hanna?

A I already had it insured. My insurance company knew it.

Q You had it insured. I'm talking about National Equipment, did you yourself communicate that fact to National?

A I didn't have any reason to. Mr. Kelly and Hanna was there with the papers, that's all that I knew to talk to.

Q All right now, you stated, Mr. Hendrix, it was your purpose to enter into these transactions to make a loan from National. What was your purpose then in seeking the loan, for what did you need a loan to pay off Western Carolina the balance of $31,000 that you owed them and Jeff Hunt Machinery Company?

A Three or four thousand dollars that I owed them on the equipment.

Q If I am correct in understanding, Mr. Hendrix,

your main needs at that time was for the equipment, was it not, rather than for any additional cash over and above what you had?

A I needed a loan to pay the equipment off. I couldn't pay the five thousand dollars, I needed something less.

Q Well, Mr. Hendrix, if you didn't have to pay that money you wouldn't need a loan. Mr. Hendrix, your main needs at that point, the time that you signed these agreements was it for cash? Did you want to see cash or was it to have your equipment to use for your jobs?

A I needed a loan to pay the equipment off, right. To pay the distributor off, the equipment people off. They were the ones that were demanding the money.

Q After you did that andafter you signed these agreements, you still had money that you had to pay?

A I had to pay National.

Q That's exactly right; but on the other hand you got to keep your equipment, didn't you?

A That's right.

Q In fact, Mr. Hendrix, did you ever receive any monies, did you ever receive a check or cash from National Equipment Rental?

A No, but Pat Kelly and Reed Hanna said that

National agreed to pay them the money for the equipment, finish paying off.

Q That's Western Carolina, and pay Jeff Hunt on the equipment?

A They furnished the money, they made the loan and I in turn was going to pay National back in monthly payments less than what I was having to pay. I was paying 70 something--

Q You answered the question.

You stated before, did you not, that Mr. Kelly confessed to you that this was a standard form lease agreement, did he not?

A That's when my wife stated to him that we didn't think that we should sign until we go to an attorney first.

Q But he did say that it was a standard form lease agreement?

A Right, and he said this is the way these people loan money because I didn't need no tax write off.

Q All right, Mr. Hendrix, you answered the question.

Mr. Hendrix, I am going to show you two more documents and ask if you can identify these.

A Yes, sir.

Q Will you tell us what they are?

A It's a National document and it concerns cost of the international tractor of $31,161.00.

Q Is that your signature at the bottom of each of those documents?

A Yes, it is.

MR. POLLECK: I offer this in evidence.

MR. ARISOHN: No objection.

THE CLERK: Plaintiff's exhibit 14 for identification marked in evidence.

Plaintiff's exhibit 14A marked in evidence.

CROSS-EXAMINATION

BY MR. POLLECK:

Q Mr. Hendrix, I am going to show you two more documents and ask if you can identify those please, and tell us what it is?

A You want me to read it?

Q Is that your signature at the bottom?

A Yes, that constitutes our verbal agreement, that I made with Pat Kelly and those in the trade.

Q Did you sign those documents?

A Yes, sir.

MR. POLLECK: I offer these in evidence.

MR. ARISOHN: No objection.

THE COURT: Plaintiff's exhibit 13 and 13A for identification, marked in evidence.

CROSS-EXAMINATION

CONTINUED BY MR. POLLECK:

Q Mr. Hendrix, exhibit 14 and 14A that you have identified, were you aware when you signed them that the documents state, and I am reading from the document now, "The undersigned requests lessor to purchase equipment of the type and quantity specified above from the vendor named above and agrees upon written acceptance of lease by an authorized officer of the lessor, to lease that equipment from lessor on terms and conditions of the lease."

A The wife and I read it. All it represents -- and there is a lot of print on the back -- we asked Mr. Kelly to allow us time to go to an attorney and read it and be assured again that it was a standard lease agreement, that's the way that National loaned money and I didn't have nothing to worry about and asked Jean to go ahead and sign it.

Q When he said that it was astandard lease equipment you trusted him and you signed the agreement?

A I asked him -- I said, "Look, Pat, you know that I have been in a scrap, I owe payrolls and payrolls and I am doing my best that's why I need" --

Q Mr. Kelly knew that you had been in a scrap?

A Yes.

Q How did he know?

A He came around on our jobs.

I guess that he's in the business of --

Q You knew Mr. Kelly from before?

A Yes.

Q From before he brought you this here? (Indicating)

A I seen him come out on the job. He knew where my job was. He assured me that's the way these people loan money.

Q In April or June of 1974, when these lease agreements were signed do you remember signing any other documents such as a promissory note?

A I think my wife had to sign.

Q A promissory note, a note, a promise to repay money -- did you sign it?

A I don't know really myself.

Q Did you sign other than that document as far as you know that required money that was loaned to you?

A I signed whatever they asked me to sign and my wife signed what they asked her to sign also.

Q You have been in business how long prior to 1974?

A Well, I think I stated to Mr. Arisohn I started out in 1959 in a part-time way.

Q But you didn't understand what you were signing

1 when you signed these agreements?

2 A I read it. It said a lease and I told Mr.

3 Kelly I didn't need a lease, I needed a loan. I didn't need a

4 tax write off, I needed a loan to give me smaller payments.

5 Q What you needed was the equipment; right?

6 A Well, I didn't need to lose all the equities

7 that I had paid in this equipment. I needed it to fulfill

8 the jobs that I had, that's right.

9 Q Now, Mr. Hendrix, let me ask you this. Were

10 all of these documents that you had signed, the lease agree-

11 ment, that's exhibit 1 and 2, which are in front of you,

12 the application for lease, which authorizes National Equipment

13 to purchase the equipment from a third party vendor; and these

14 authorizations which say in the one case, this is to authorize

15 you to pay the vendor -- and in the other case I have acknow-

16 ledged the delivery on the Caterpillar from Jeff Hunt, and

17 authorize you to pay them in full for the equipment $84,442.74;

18 where all of these documents having been signed by you, were

19 you still at that point after you had signed those documents,

20 convinced that you had made a loan of money from National

21 Equipment Rental?

22 A It was my understanding you all were to pay

23 off the money owing on the equipment and I was to give you

24 monthly payments.

25

Q And that was the understanding that you had from Mr. Kelly?

A My understanding, that's the way you all loan money.

Q Mr. Kelly told you that?

A That's what Mr. Kelly and Reed Hanna themselves say.

Q Mr. Kelly and Mr. Hanna told you that?

A That's right.

Q And that's what you still thought after reading and signing all these documents?

A I thought so.

After you pay ten percent and you lease it back to me, then no further payments.

Q Mr. Hendrix, were you familiar with Jeff Hunt Machinery and Western Carolina Tractor Company?

A Yes, sir.

Q What business were they in?

A Well, they were equipment distributors, or the dealer for their particular product.

Q They were regular dealers in the regular course of business in this type of equipment?

A Selling this equipment. Their business to sell the service, keep it running. Sell me part if I need part

or repair it if I need to take it for repair.

Q Mr. Hendrix, sir,were the few payments you made to National, aside from the monthly rentals that were called for under those documents?

A Besides what again?

Q You made a few paymentsunder these agreements or at least --

A I paid eight some hundred dollars in advance on the scraper which was three months and I paid two or three months in advance on the bulldozer;at the same time we signed the document I gave him my check. I already paid Jeff Hunt and I paid Western Carolina a lot of money, and I also gave you a lot of money in advance.

Q The amount that you paid included the use tax?

A I believe that's a state requirement that in fact what you are doing is buying the equipment you have to pay for it each month. Partially buy it or wholly buy it. The state is going to get their tax, that's my understanding. Buy it in a lump, pay cash or you buy it by the month. They are going to get their cash.

Q Now, Mr. Hendrix, you testified a few moments ago when Mr. Kelly appeared with documents from National Equipment, they were presigned documents?

A I think so. I am not positive on that.

Q You are not sure?

A I am not one hundred percent sure. I can't swear to it, but I believe they were signed when he had them.

Q Were those documents signed generally around the dates that is on there, April, June of 1974?

A I would think so. I don't think I would sign something that would have been blank with no date.

I see something that says signed here -- it looks like it was signed then -- indicating for me to sign.

Q Are there dates appearing on those documents next to the signature of National?

A Yes.

Q Are they earlier or later than the date you signed them?

A Where I sign it, then above it's stamped and where Mr. Jacobs signed it the date is written in, and the date National signed is -- but is the date stamped in -- I don't have a date written in when I signed it. I didn't pay particular attention at this point. It could have been that they signed it first or later, I am not sure.

Q Mr. Hendrix, you testified earlier on direct examination prior to signing these agreements with National you were renting the machinery from Jeff Hunt?

A I was paying them each month, pretty heavy

payments. If I didn't have cash money, then I could buy it on a month to month basis where I paid $50 some hundred dollars and that's a lot of money. It might rain, you might not use it much.

Q In other words, it was your understanding upon the last payment, the final payment --

A To whom is this now?

Q To Jeff Hunt Machinery and Western Carolina, that you would own the material?

A If I elected to keep making those heavy payments when I got to a point where I couldn't make that much --

Q I am talking about -- we are talking about what you testified to before, your understanding of Jeff Hunt and Western Carolina?

A Yes, sir. When I paid them each month they gave me credit, that much off the purchase price of the machine. If I paid $5000.00 the unpaid balance dropped.

Q As far as they knew they had a mortgage on this equipment while you were paying it off?

A I am just not sure. It was just a monthly payment to Jeff Hunt to Western Carolina.

Q Well, what was there Mr. Hendrix that was so different about your agreement with them as compared to your agreement with National?

A They are not suing me; you all are suing me.

Q Your understanding of both of these types of agreements -- your understanding what was so different about those agreements as compared to these.

MR. ARISOHN: Objection.

THE COURT: You may answer.

A What was the difference?

In other words, I was buying it on a month to month basis and it wasn't no lawsuit involved and it appears that after signing these papers in all, if I became late after midnight one payment date that you could charge me for the whole 40 some months, all the interest; $20,000 attorney fees and $8500 or $10,000 to pay somebody to sell it for me.

Q You said that it was no lawsuit. Are you telling me if you were unable to keep up your payments, if you were unable to borrow money, that if Jeff Hunt and Western Carolina had sued you that that would have changed the nature of your agreement with them?

A It was no suit with them.

Q I asked you what is different about the National Agreement from those two?

A I told you what the difference is.

Q You said under the National equipment you had a right to own theequipment after you finished paying for it?

A Yes.

Q And the same was true under Jeff Hunt and Western Carolina agreement?

A That's right.

Q You are choosing to call this a loan and you are choosing to call that a sale on credit; is that correct?

MR. ARISOHN: Objection.

A You call it what you want to call it for your benefit. I know what I signed.

Q You know what was in your mind?

A I knew what my needs were.

Q You had smaller payments under a longer period of time with National?

A Yes.

Q Did that change the nature of the agreement; is that why you say you borrowed money from National, but you wer e paying off equity interest in Jeff Hunt and Western Carolina?

A You loaned money any other way?

Q Is that the difference?

Didn't you borrow money from Jeff Huntand Western Carolina?

A Well, it was a loan. I don't see any other way you could figure it, whether I went to you or a bank, they had

to be paid -- Western Carolina had to be paidoff. I didn't have the cash money to pay off.

Q You mentioned on your direct examination that you did not need a tax write off. What do you mean by a tax write off?

A I don't know that much about it, but when they brought these papers to me to sign, I asked them, isn't a lease paper something that a construction company is involved with, good profits and making lots of money and they have to pay the Government a good bit of income tax, and if they borrow through a lease arrangement then the Government allows them to write all of that off as expense on that job, then they don't have near as much profit to shell out on that job. I said, I don't need that, I don't have any need for a tax write off. All I need is financing, a loan to pay these companies that I won't lose all of the money that I paid in and compared to what this equipment is worth now, all I wanted was a loan.

MR. POLLECK: I would like a few moments to find something in the transcript.

THE COURT: All right, let's take a five minute break.

Remember, ladies and gentlemen, what you are going to be concerned with is whether there was a lease

or a loan at the time that it was entered; is that clear? The fact that subsequently there was a suit doesn't change that at all. All right, you could step down. Take five minutes while the attorney is looking for what he wants.

(Whereupon, a short recess was had.)

(After recess.)

(Whereupon, the jurors entered the courtroom and are now seated in the jury box.)

CROSS-EXAMINATION (CONTINUED)

BY MR. POLLECK:

Q Mr. Hendrix, you remember testifying at an examination before trial, a pretrial deposition of this matter

A Yes, sir.

Q I am going to read questions and answers from your examination before trial, page 15.

THE COURT: Now, ladies and gentlemen, a deposition is an examination before trial. The witness is placed under oath, there is a reporter present just like the one before you; the only difference is that there is no judge there, each side is represented by attorneys.

Q I'll read the question and your answer.

"Question: Mr. Hendrix, you say it was Mr. Hanna whom you negotiated with on behalf of National Equip-

1 ment Rental, Ltd?

2 "Answer. Yes, sir, he is the one who brought

3 the contracts out for me to sign."

4 Remember that?

5 A Yes.

6 Q And again on the same page, "Do you recall whether

7 you held on to them for a few days or you signed them right

8 away?

9 "Answer: No, Isigned them right in his presence.

10 He was in a hurry to go. He was late for a dinner, he

11 was with someone else, who was with him there that is

12 also in the financing business. I started to read the

13 contract and he assured me that they were standard

14 requirements of lease equipment.

15 "Question: And did you not ask that you be

16 allowed a certain amount of time to look them over be-

17 fore you signed them?

18 "Answer: Well, I did. I did. I asked him

19 whether he thought I should have my attorney read them.

20 He said it's a standard form. He said, all people

21 were protected. He said thatit was designed to protect

22 the people who had the lease. He said you don't have

23 to worry about them, it's standard lease form, the

24 standard requirements."

25

1 Is that correct?

2 Q This other person that he had with him, who was

3 that?

4 A Pat Kelly.

5 Q That was Mr. Kelly?

6 A Yes.

7 Q And you stated that he was with someone else

8 that was with him there that is also in the financing business,

9 is that correct?

10 A Yes.

11 Q Did you know Mr. Kelly was in another business?

12 A I knew he was in the financing business, but

13 I didn't know who he represented full-time, and who he

14 represented part-time.

15 Q Mr. Hendrix, at the first trial of this action,

16 you remember that?

17 A Yes.

18 Q The first trial of this action, do you remember

19 that?

20 A Yes.

21 Q Page 178 of the transcript:

22 "Question: So the people with him you say were

23 from J&M Financing, you knew they weren't from National.

24 A That's right. I knew they weren't from -- I

25

1 knew him as an officer who worked out of the office,
2 and hwen he came in that's where he was from, J&M".
3 A M&J is what it shouldhave been.
4 Q But in any case, not National Equipment.
5 A That was the first time that I seen any
6 association with him with National.
7 Q But that's the time that he came in with those
8 agreements?
9 A That's right, it was new to me when he came in
10 with National.
11 Q Mr. Hendrix, on page 17 of the Examination
12 before Trial, starting at line six you stated in answer to a
13 question, "I was just -- "
14 MR. ARISOHN: Let's have the question.
15 Q "Question: Is the regular equipment a common
16 means of doing business in your particular business?--"
17 Mr. Arisohn, objected, noted his objection
18 for the record. Mr. Arisohn said "You could answer".
19 "Answer: Well, no, sir. I was just seeking a
20 method of reducing these $5200 a month.
21 "Question: That referred to what you were paying?
22 "Answer: To J&M Machinery.
23 "Question: Jeff Hunt?
24 "Answer: Outlay on cash each month and over a
25

1 longer period of time then I could finish paying the
2 balance."
3 A That's right.
4 Q So your primary interest, Mr. Hendrix, again,
5 was to pay less per month and if you had to over a longer
6 period of time; is that correct?
7 A That's right.
8 Q In fact Mr. Hendrix, isn't it true that your
9 consideration of these transactions as a loan never even occurred
10 to you until after this litigation was begun?
11 A No, all that was brought up with my wife when
12 they asked her to sign it. I didn't want her to sign anything
13 in this situation. All that was brought out was assured to me
14 that that was the only way we could get the money.
15 Q The only way you could keep your equipment; isn't
16 that right?
17 A That's right.
18 MR. POLLECK: That's all the questions I have.
19 MR. ARISOHN: I have a few questions on redirect,
20 your Honor.
21 REDIRECT EXAMINATION
22 BY MR. ARISOHN:
23 Q You were asked a series of questions by Mr.
24 Polleck about Mr. Kelly, whether Mr. Kelly was representing
25

National Equipment or whether he wasn't representing National Equipment. Do you remember those questions?

A I remember them in general; yes.

Q So the record is clear, Mr. Hendrix, what was your understanding as to what interest Mr. Kelly was representing when he brought those papers for you to sign?

A From what I know about the whole entire transaction at that time and now -- you want to know what I know about it from that time when I signed it?

Q I want to know on the date that Mr. Kelly, together with Mr. Hanna brought the papers for you to sign, what was your understanding as to who Mr. Kelly was representing?

A Mr. Kelly was representing National because he is the person who had the papers; Reed Hanna was representing Western Carolina. He was the salesman, that's why he was there.

Q Mr. Polleck asked you some questions what the difference was between the deal you had with Western Carolina, Jeff Hunt -- and Jeff Hunt on one hand and the deal that you had with National Equipment on the other; remember those questions?

A Yes.

Q Let me ask you, sir. To your knowledge, are both of those companies, that is Jeff Hunt Machinery Company

1 and Western Carolina Tractor Company, are those companies
2 suppliers of the type of equipment which you ended up possess-
3 ing from them?
4 A Yes, they are the dealer for the plaintiff.
5 Q Is National Equipment such a company?
6 A From what I found out they deal with money.
7 Q If you had a problem with the equipment while
8 you were paying Western Carolina and Jeff Hunt Machinery
9 Company, could you have taken the machinery back to Western
10 Carolina and Jeff Hunt?
11 A That's the nature of their business.
12 MR. POLLECK: Objection, that's a conclusion.
13 THE COURT: Of course, it deals with state of
14 mind. I permit it. Always a state of mind at the time
15 the transactions were entered into.
16 A Well, what I mean, that's their business. They
17 have a service department to make repairs.
18 Q Have you had a problem with the equipment while
19 you were paying National Equipment Rental could you have taken
20 the equipment to them for repair?
21 A I don't believe they had anybody to help me.
22 I didn't know about it if there was.
23 Q To your knowledge, when the payments which you
24 were making to Western of $2,000 per month and the payments
25

that you were making to the Jeff Hunt Machinery Company of the $5200 per month, calculated by applying a rate or an interest rate to the cost of the equipment?

A No, that's what they wanted me to pay them each month for the equipment, and they gave me credit off of what I owed them for the purchase price of the machines.

MR. ARISOHN: I have no further questions.

THE COURT: All right, step down.

Any further witness?

MR. ARISOHN: No questions.

That's it for the defense.

THE COURT: Reserve your motions. Anything for the plaintiff?

MR. POLLECK: Yes, I have witnesses to call, your Honor.

THE COURT: Call them.

MR. POLLECK: Mr. Jacobs, take the stand, please.

(The witness previously duly sworn recalled on the plaintiff's case after having been duly sworn.)

DIRECT EXAMINATION

BY MR. POLLECK:

Q I am going to show you plaintiff's exhibit 11 and 12 in evidence and ask you to identify them please for the jury.

A Each of these are purchase orders from National

Equipment. The first is to Western Carolina Tractor Company and the other one is to Jeff Hunt Machinery Company for purchase of the respective equipment which was the subject of the lease.

Q Are those purchase orders the type of purchase orders issued in the course of doing business by National Equipment?

A Yes, it is.

Q Under what circumstances?

A The circumstances for the issuance of the purchase order would be a court synopsis of the transaction once the transaction is approved, and once all of the documents are in the office signed and everything we need is required we will then issue ourpurchase order for purchase of the material which would be under the lease.

Q All right, Mr. Jacobs. You notice at the lower left hand corner of those documents appears to be a resale number, do you know what that is?

A Yes.

Q Will you explain it please?

A In each of the states we have a resale certificate number whereby when we purchase equipment for lease that it is not subject to sales tax at the time since we are going to be putting it out on lease.

Q All right, thank you.

Let me show you copies of what has been marked as defendant's exhibit L and M in evidence and ask you if you can identify those?

A These are the invoices, one from Jeff Hunt Machinery for $84,442 and the other from Western Carolina Tractor Company for $31,161.00.

Q Let me show you two documents which have already been introduced into evidence as defendant's exhibit K and O and ask you what those represent?

A These represent the checks that National assured to two vendors, Western Carolina and Jeff Hunt for payment of their invoices.

Q And those payments of the two invoices that I have just shown you, you have just identified?

A Yes, sir.

MR. POLLECK: That's all the questions that I have.

THE COURT: Any cross?

MR. ARISOHN: Let me see the documents.

(Counsel looking at documents.)

MR. ARISOHN: I have no questions.

THE COURT: Any further witness?

Any other witnesses?

1 MR. POLLECK: Yes.

2 J O H N S H O U P, was called as a witness and sworn by the

3 clerk of the Court, and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. POLLECK:

6 Q Will you state your position with National

7 Equipment Rental?

8 A Branch Manager for the Charlotte Branch, North

9 Carolina.

10 Q As Branch Manager, what are your functions, your

11 duties?

12 A Run a complete sales office that covers several

13 states in that area.

14 Q Mr. Shoup, will you tell us how and through whom

15 you initially became involved with the transactions between

16 National and defendant H. Walter Hendrix?

17 A During the normal course of our business one

18 day we received a phone call from Pat Kelly from Columbia,

19 South Carolina. I had never heard of Pat Kelly before, but

20 when he called he identified himself as being a broker, and

21 that he had a lease transaction that he would like to have

22 us look at, and I told him, fine, we would like to look at

23 it, that's our normal business and he said -- he gave me a

24 little description about it and the equipment and who the

25 seller of the equipment was to see if it would be equipment

that would fit in with our portfolio. I told him that it did, I told him to proceed to send the information on the lessee to us so that we could evaluate it.

MR. ARISOHN: Might we have a hearsay instruction that you gave the jury?

THE COURT: This will come in not to show the truth of the statements, but only to show the state of mind of the participant.

Q (Mr. Polleck continuing) -- Mr. Shoup, did Mr. Kelly identify the lender those who owned the equipment?

A Yes, he did.

Q What did he tell you?

A He told me that it was two pieces of equipment used in construction and they were being shown by Western Carolina and Jeff Hunt.

Q What did you do after that?

A After that he sent the information that we would require on Mr. Hendrix to make a credit evaluation. He mailed that to us.

Q To you?

A Yes, in Charlotte.

Q And what did you do with it?

A We evaluated it.

We did our normal procedures and we had to go back to

1 get some additional information to Pat. He had to recontact
2 Mr. Hendrix for some additional credit information. I believe
3 that he did it two or three times, but over the course of a
4 period we approved the credit.
5 Q Now Mr. Shoup, did you ever speak to Mr. Hendrix
6 directly?
7 A No.
8 Q Did you ever see Mr. Hendrix before today?
9 A No.
10 Q Did you ever speak to him before today?
11 A No.
12 Q Mr. Kelly or anyone else ever say anything to
13 you about Mr. Hendrix' desire for a loan?
14 A No. He stated as I stated earlier that was his
15 presentation of the transaction, he knew that we are a leasing
16 company.
17 Q Did you have any conversation after that with
18 Western Carolina Tractor Company?
19 A Yes, when we approved the loan for the equipment
20 on a lease basis. I called the two vendors and told them
21 that we had approved the lease and asked them for a description
22 of the equipment, and telling them we would issue a purchase
23 order to them, and then they asked how soon can we get paid
24 for the equipment, so I told him as soon as we received their
25

1 invoice we would process it for payment.

2 Q Did they ever mention to you that they were

3 leasing this equipment to anyone or that anyone ever --

4 A The first time I heard it is here today.

5 Q What was your relationship, with Western Carolina

6 Tractor Company and Jeff Hunt Machinery Company?

7 A This was my first relationship with them.

8 Q Did you know of them?

9 A Certainly, they're all over the Piedmont area.

10 Q What did you know them to be?

11 A Very reputable dealers of equipment.

12 Q In this type of equipment?

13 A Yes.

14 Q Mr. Shoup, have you ever been involved in arrang

15 ing loan type transactions?

16 A Yes.

17 Q What do you do in terms of documents prepared

18 for that type of transaction that you do not -- that you did

19 not do here, if anything?

20 A If we have a loan transaction we are dealing

21 principally with the customer where the equipment would be

22 in his possession, then it's a completely different documentat-

23 ion, it has to be.

24 Q What documents would you prepare?

25

A We would prepare a security agreement. Before we could do that we would have to acquire title to the equipment. We would have to do that on a bill of sale.

Q What about a promissory note?

A Yes, there would be a note attached to the security agreement.

Q Were any of those types of documents prepared with respect to this transaction with Mr. Hendrix?

A No.

MR. POLLECK: No further questions.

A (Continuing) -- no, they weren't necessary.

MR. POLLECK: No further questions.

CROSS-EXAMINATION

BY MR. ARISOHN:

Q How long have you been working for National Equipment Rental?

A Almost five years.

Q Employed by them?

A Yes.

Q Pays your salary?

A Yes.

Q What is your salary?

MR. POLLECK: Your Honor, object, completely irrelevant to the case.

THE COURT: I suppose it bears on credibility. I will allow it.

A All together, $50,000 range.

Q Per year?

A Yes.

Q Also paid commission?

A Yes.

Q What commission rate do you get?

A There is a different set up for different types of transactions. I'm paid a base commission on the dollar amount of the deal and plus a salary.

Q Does your commission vary as the deal varies?

A The larger the deal the larger the commission.

Q You get the same commission on loan arrangements?

A The percentages are different.

Q What is the percentage?

A You want me to answer that?

I get one percent.

Q Of the purchase price to National?

A Yes.

Q So, am I correct in this case where the purchase price was some $31,000 and some $84,000 your commission amounted to about $1800?

A I would say 11.

1 Q $1150?

2 A Yes.

3 Q National paid you that?

4 A Yes.

5 Q And they paid you that after the agreement here

6 was executed?

7 A After the transaction was finalized.

8 Q Now, you testified that you are the branch manager

9 of National Equipment Rental in Charlotte, South Carolina?

10 A Yes.

11 Q You work out of an office?

12 A Yes.

13 Q An office building?

14 A Yes.

15 Q There are no showrooms in that building,

16 are there?

17 A No.

18 Q You have no catalogues that you give to customers

19 who come in, do you?

20 A No.

21 Q As Mr. Jacobs said earlier this morning, what

22 you deal in is money; right?

23 A Yes.

24 Q You testified that you had dealings with a man

25

1 named Robert Pat Kelly in connection with the Hendrix transact-
2 ions; is that correct?
3 A Yes.
4 Q And is it your testimony that you had no prior
5 dealings with Mr. Kelly?
6 A That is correct.
7 Q And is it you who gave Mr. Kelly the documents
8 from National to take to Mr. Hendrix?
9 A We mailed them to him.
10 Q And you instructed Mr. Kelly, did you not, to
11 take the documents to Mr. Hendrix and have Mr. Hendrix
12 execute them?
13 A We sent him instructions on how they should be
14 executed.
15 Q In fact Mr. Kelly was acting as your agent,
16 was he not, for National Equipment Rental?
17 A No, he wasn't.
18 MR. POLLECK: Objection, this calls for a conclusion.
19 A He was not.
20 Q How would you describe his relationship to
21 National, doing you a favor?
22 A I could have done it myself.
23 Q You had a business relationship with him?
24 A Certainly.
25

1 Q In fact Mr. Kelly received a commission from your
2 company for the services he performed?
3 A That is right.
4 Q Is the amount of $2440.34?
5 A Yes.
6 Q National Equipment paid him for services?
7 A Yes, sir.
8 Q In fact he was an employee of National?
9 MR. POLLECK: I object, that calls for a conclusion.
10 THE COURT: I'll allow it.
11 Q He was not?
12 A No.
13 Q Was the $2,000 check to Mr. Kelly a gift?
14 A He's not an employee. It's a charge that he makes
15 for submitting a deal to us or any other leasing company in
16 that he is paid for submitting the deal.
17 Q He was paid for the services here, was he not?
18 A Certainly.
19 Q And his services were rendered to National?
20 A As well as to himself and Mr. Hendrix.
21 Q National paid him the fee, not Mr. Hendrix?
22 A That's right.
23 Q Now, you stated before that you were interested in
24
25

1
2 obtaining credit information on behalf of Mr. Hendrix; is
3 that correct?
4 A Yes.
5 Q In that you evaluated the credit information you
6 got, didn't you testify to that?
7 A Yes.
8 Q And you processed it in your normal procedure as
9 you call it?
10 A Yes.
11 Q What are your normal procedures?
12 A Just evaluate credit.
13 Q How do you do that?
14 A By financial statements, credit reports, bank
15 checks, etc.
16 Q Did you have Mr. Hendrix and his wife fill out
17 a credit report?
18 A Pat Kelly sent the information in as -- he sent
19 statements in plus references on Mr. Hendrix.
20 Q Upon those statements was a credit form filled
21 out by Mr. Hendrix; isn't that correct?
22 A That may have been.
23 I don't know what form it took,but they were on some
24 paper.
25 Q In other words, you got financial data about
Mr. and Mrs. Hendrix?

1
2 A Yes.
3 Q And you used that financial data to determine
4 whether or not you would recommend to your company to make
5 thisdeal; is that correct?
6 A Certainly.
7 Q In fact some of the many procedures your company
8 uses inevaluating this credit data was to do a credit check?
9 A Yes.
10 Q And you checked the references Mr. Hendrix gave
11 you and your company in that information sheet that he gave
12 you?
13 A Yes.
14 Q Did you use a credit company to do that or did
15 you do it yourself?
16 A We did it ourselves.
17 Q And based upon the information that was in the
18 credit sheet which you checked, you determined that the
19 transactions should go through; is that correct?
20 A We determined that Mr. Hendrix would be able to
21 repay the lease of the equipment that we made to him.
22 Q He would repay the payments that you made to
23 him?
24 A Yes.
25 Q And you base that on the information that Mr.

Hendrix provided you, and you based it also on your evaluation of that information? And the checking of it?

A Sure.

Q This procedure required Mr. Hendrix to give your company credit information and your checking it and making your determination. To make the deal on that evaluation was a significant part of the deal, was it not?

A It's a significant part of every deal.

Q You would not have made this arrangement or deal with Mr. Hendrix had the credit information not turned out to your satisfaction?

A That's right.

Q Did you yourself ever go down to take a look at the equipment that was part of this deal?

A No. I did not think it necessary.

Q That's because the quality of the equipment was not important?

A It's because of the vendor selling the equipment, I knew who they were.

Q Was it your understanding at the time you made this arrangement and recommended that National enter this deal with Mr. Hendrix that these vendors had the equipment.

A Yes, they had it.

Q They had the equipment?

A Right.

Q Not Mr. Hendrix?

A I never knew Mr. Hendrix had it.

Q And you testified before that when you make arrangements for loans one of the differences between the loan type arrangement and lease type arrangement was the person getting money, the person to whom the loan is made would have theequipment; is that correct?

A Yes, if he owned the equipment then we have to acquire title to it by some means.

Q So have you had information that Mr. Hendrix had possessed the equipment at the time you were making this deal that would change your opinion as to whether or not this was a lease or loan?

A It may have.

MR. ARISOHN: I have no further questions.

MR. POLLECK: Some redirect, your Honor.

REDIRECT EXAMINATION

BY MR. POLLECK:

Q Mr. Shoup, what was your first connection with Mr. Pat Kelly? How did he get in touch with you and who got in touch with who?

A He called us.

Q And you had known him before?

A No, I never had known him at all.

Q He called you with respect to this proposed or possible transaction?

A Yes.

Q Did Mr. Kelly or anyone else ever tell you that Mr. Hendrix had this equipment in his possession already?

A No, they didn't.

MR. POLLECK: All right, thank you.

THE COURT: All right, step down.

MR. POLLECK: I have no further witnesses, your Honor.

THE COURT: Then you rest?

MR. POLLECK: The plaintiff rests.

THE COURT: All right.

MR. ARISOHN: No rebuttal.

THE COURT: Let me go over the proposed charge with the attorneys, ladies and gentlemen, so they know how to argue and we will give you the case this afternoon.

Now, do you have all of the documents that were marked; the jury has some of them. What else do you want to give them?

MR. ARISOHN: I would like to give the jury just two otherdocuments, your Honor, which I do not

1 have copies of, but I will give them the originals.
2 These are defendant's exhibit J and M.
3 THE COURT: All right, give them to the foreman.
4 MR. POLLECK: 13 and 13A, and 14 and 14A which
5 were marked in evidence, I have photocopies. They are
6 not marked with the exhibit numbers, but I have enough
7 to distribute.
8 THE COURT: Give them to the foreman and he
9 will distribute them.
10 Now, the jury has everything that was referred
11 to by the witnesses.
12 MR. POLLECK: I believe they have copi of
13 everything.
14 MR. ARISOHN: Also a copy of the check to Mr.
15 Kelly, and copies of the financing statements that were
16 filed.
17 THE COURT: If you want them to have it.
18 MR. ARISOHN: Defendant's Exhibit B, I and Il.
19 THE COURT: Anything further?
20 Why don't you go in ladies and gentlemen and
21 look at those documents that you haven't seen and we
22 will try to get the case moving so that we can finish
23 today if possible.
24 (Whereupon, the jurors were excused from the
25 courtroom.)

THE COURT: You both have the proposed charge. Any objection?

MR. POLLECK: Yes, your Honor, I have objection.

Firstly, as far as the burden of proof is concerned, your Honor, at the bottom of the second page you say that when we say the party has the burden of proof upon an issue we mean with respect to that issue that party must convince you that it is more likely than not. Sometimes this is referred to as a preponderance of evidence. My proposed charge, as I pointed out to your Honor, the cases hold that the burden in the cases of usury is more than a question of preponderance; that the defendant must prove that affirmative defense clearly.

MR. ARISOHN: I have not read any such case and the cases that I have read talks about preponderance of the evidence. I think the standing case talks about that.

THE COURT: Let me have that blue back book; the Famon case used the word preponderance. This was the charge that was approved by the Court of Appeals, I would rather follow it.

Page 394 of the record in that case the Court says: "The defendant has the burden of proving each

of them, namely the affirmative defenses, and must do so by a fair preponderance of the criminal evidence. That is the charge I gave them.

MR. POLLECK: The cases I cite, state as clear evidence -- as all the evidence essential thereto--

THE COURT: I'll read it again.

MR. POLLECK: That a fair preponderance is required in usury cases.

THE COURT: Decided by what Court?

MR. POLLECK: Rinaldo case, Third Department, 1964.

THE COURT: Well, here it says again -- I am referring to the Second Circuit.

"In other words a preponderance of the evidence means such evidence as when considered and compared with that opposed to it as more convincing for us and produces in your minds belief that what is thought to be proved is more likely true than not true."

Now, it's true that this question of burden of proof would be controlled, as I understand it, by the State law. The steel charge took place in 1959 and was affirmed in 1960.

Any other late case from New York?

MR. POLLECK: All of the cases that I cited in

my second request to charge, your Honor, bear on the extent of the burden.

THE COURT: All usury cases?

MR. POLLECK: Yes, they are.

Also 37 N.Y.Sup. 2nd, 305; Court of Appeals case in 1975, 372, N.Y. Sup.2nd. And the Herringer (Phonetically) case talks about the presumption against usury.

THE COURT: You want me to look at 240--

MR. POLLECK: 246.

THE COURT: And 372 N.Y.Second - 63.

MR. POLLECK: And one more thing, your Honor. Your Honor does not state in your charge, as I have requested, that you state, that one party's secret intent -- the defendant's secret intent to make a loan is not at all controlling; that the intent of the party is considered by considering the entire relationship between them and what they said and what they did, including documents executed by them.

THE COURT: I'll put that at the bottom of page 4; a secret intention does not control; is that all right?

MR. POLLECK: All right.

THE COURT: Secret intention of one party does not make a transaction a loan if the other indications

show that it is a lease. Anything else?

MR. ARISOHN: If your Honor is going to add that to your charge, I would respectfully request that the second paragraph of my request number twelve be added which reads:

"Since intention is a subjective matter, a state of mind, you should consider not only the testimony of the parties themselves, but their conduct and statements prior to the exec ution of the agreement insofar as you consider that it bears upon their intention."

THE COURT: Exactly. If you look at what I charged at the bottom of page four you will see it is exactly what I charged.

MR. ARISOHN: I am sorry, your Honor, I apologize.

THE COURT: Hold it just a moment while I look at Rinaldo.

Yes, the Court of Appeals say the cases in this jurisdiction require a strict degree or quantum of evidence rather than a mere preponderance in a usury case, and that's 246, N.Y. Supp.2nd at page 809.

MR. ARISOHN: May I have an opportunity to look at that, your Honor?

THE COURT: And in Giventer v.Arnold, N.Y. Court of Appeals, 372, N.Y. Supp. 2nd, at page 67, the Court

of Appeals say:

"The usury defense must be established by clear evidence as to all the evidence essential thereto "; and it speaks of the presumption. I am going to give this whole paragraph.

I think the plaintiff is right --

"When we say that the party has the burden of proof upon an issue we mean with respect to that issue that party must convince you by 'clear evidence' that its contention is true," and I'll take out the phrase "Sometimes this is referred to as a preponderance of evidence" and I'll put in that whole paragraph reading as follows:

"We do not expect that certainty" etc --that paragraph comes out on page 3 and I'll insert the following from the Giventer case "The jury will not assume that the parties entered into an unlawful agreement, that is to say usurious agreement. On the contrary when the terms of the agreement are in issue and the evidence is conflicting"-- you want lender--plaintiff, I better say here..

MR. POLLECK: Yes, plaintiff.

THE COURT: "Is entitled to a presumption that the transaction was not usurious ".

I'm given this only because under Erie vs. Tompkins I feel compelled to do so. Much of the usury law in New York it makes no sense whatsoever since the burden of proof is already on the defendant; to talk of a presumption is a piece of obscurity since you can't shift any more burden to the defendant than he already has.

MR. ARISOHN: Two points on that language. First, it seems to me that we are talking about presumption of transaction is not usurious. Without reading the whole case that your Honor has before you, it seems to me what they are talking about the interest rate as opposed as to whether or not a transaction is a loan or some other arrangement; as in this case a lease.

THE COURT: You want me to take out the word--

MR. ARISOHN: I would like you to take out the word presumption. It's like a directed verdict against me almost.

THE COURT: I'll take it out because it makes no sense at all here since you already have the burden.

MR. POLLECK: Your Honor has mentioned an alternative to loan; a lease. I would ask you to charge they may also find some other type of transaction. They may find that it's a conditional sales transaction.

1

2 THE COURT: I don't see how on the evidence --

3 you could find that it's either a loan or lease, there

4 is no other language used.

5 MR. POLLECK: I think this is a conditional sales

6 contract. I think it's easy for a jury to find the

7 facts that imply that this was a -- maybe your Honor

8 could draw a conclusion -- or a purchase money mortgage.

9 THE COURT: Where is this that you object?

10 MR. POLLECK: Well, on the top of page four your

11 Honor states whether this is a loan or a lease, and

12 your Honor uses the term lease rather than leased

13 coupled with others throughout.

14 THE COURT: I'll say the issue is whether this

15 was a loan. Plaintiff denies that a loan for money

16 was made, that the transaction was a bonafide lease of

17 equipment or some other --

18 MR. POLLECK: Some other transaction --

19 conditional sales contract or purchase money mortgage.

20 THE COURT: You want that, I'll do it.

21 It seems to me that it makes it easier for

22 the defendant because if you have to have all of those

23 different alternatives the defendant must be right.

24 If you want it I'll put it in.

25 MR. POLLECK: I would like your Honor to explain

1 what a conditional sales contract is or what a purchase
2 money mortgage is.
3 THE COURT: What is a conditional sales contract?
4 MR. POLLECK: It's a transaction by which the
5 creditor really --
6 MR. JACOBS: It would be a sale of equipment
7 by time basis.
8 THE COURT: Would you want to get up and so testi-
9 fy, that might be the easiest thing to do.
10 MR. JACOBS: Purchase money mortgage would be
11 supplying the funds for the purchase of material.
12 THE COURT: Do you want to get up and testify
13 to that?
14 I'll open it up and let you do it.
15 There is nothing in the record now. If you want
16 to reopen the case you could tell the jury what a
17 conditional sales contract or purchase money mortgage
18 is.
19 MR. JACOBS: I can testify to that, but not
20 testify as to what the transaction was.
21 THE COURT: But you could describe it. I will
22 let you get up and describe what these things are. Do
23 you want to do that?
24 MR. JACOBS: You want to have it in?
25

1

2 MR. POLLECK: All right, we will appreciate it.

3 THE COURT: Let's get the rest of the charges

4 straightened out.

5 Anything else that you object to?

6 MR. POLLECK: I just wanted to note, your Honor

7 took a lot of National Equipment Rental vs. Stanley

8 which was a sale in leaseback transaction whatever this

9 is, it isn't that; it's completely different.

10 THE COURT: I followed the Stanley case very

11 closely. That's the only Second Circuit case that we

12 had.

13 MR. JACOBS: If I may say something. The Stanley

14 case I think is differential in the leasing industry.

15 The Stanley case, facts were quite clear that the

16 defendant had the property in its possession, had title

17 to the property, that all of this material was loaned to

18 all of the parties which in the field is termed a lease

19 back , wherein the lessee would sell the equipment to

20 the leasing company who would lease it back. There

21 is then a distinction made in those situations where

22 you had a third party who owns the equipment from whom

23 the leasing company purchases it and leases it to the

24 lessee. I think that is the clear distinction.

25 THE COURT: I think this is essentially a Stanley

case. Anything else you want?

MR. POLLECK: No, nothing.

THE COURT: What does the defendant want?

MR. ARISOHN: First with respect to my request to charge I do not need to --

THE COURT: I would like to know what you are objecting to.

The reason I do this in advance, I have it typed up, if possible we could get a sensible charge. It doesn't make any sense to throw a lot of boilerplate at me.

MR. ARISOHN: Your Honor on page five of your charge takes the language from the charge of Judge Steele.

THE COURT: I'll charge on page five and say "In seeking to determine whether a loan of money was intended" -- then I'll leave what I have there and I'll say "Mr.Jacobs testified with respect to a conditional sales contract and purchase money mortgage.

MR. ARISOHN: Your Honor, first of all, with respect to this new theory which is now going to be introduced, this case was originally tried back in September of 1976. One of the issues in that case was whether the contract here were leases or loans. Your Honor

1

2 dismissed that affirmative defense at the close of the
3 evidence and your Honor then changed your mind and posed
4 the issue to this trial whether these agreements were
5 issues or loans. Now, having Mr. Jacobs testify whether
6 certain agreement is purchase money orders or conditional
7 sales contracts -- and I must say, I am at a loss because
8 I haven't researched that myself and he could get up
9 there and say whatever he wants to and I would have to
10 accept it.

11 MR. POLLECK: I would have to remind you that
12 your answer within this affirmative defense pleaded
13 that this was a conditional sales contract.

14 THE COURT: Well, gentlemen, no point quibbling
15 about it. I will allow him to testify under instruct-
16 ions from the New York Court of Appeals -- and it
17 certainly makes sense to try insofar as possible to
18 give a lender or lessor of this kind every opportunity
19 to show that it's a non-usurious agreement. As I say,
20 I have very grave doubt whether it's constitutional.
21 Certainly a lender or lessor ought to be able to show
22 that he hasn't violated the law. I am not going to
23 restrict him.

24 MR. ARISOHN: Ok. With respect to your Honor's
25 charge on the top of page five in setting forth some of

1
2 the factors that the jury might consider in determining
3 whether thetransaction was a loan or some other
4 transaction, I have set forth in my request 14 a series
5 of factors which I believe the Court in the three cases
6 which I cited throughout, utilized in finding a trans-
7 action involved in those cases are a matter of law
8 were loans. I believe if your Honor is going to set
9 forth some of the factors, such as you heard on the top
10 of page five, that the jury might get the benefit of
11 learning in those three cases --
12 THE COURT: Well, I am going to add to that
13 "Counsel for the defendant in his argument emphasized
14 the variety of the factors in the case that defendant
15 contends to the loaner characterization" so you can
16 make all of those arguments.
17 MR. POLLECK: If your Honor please, can we just
18 permit counsel to make the argument without having your
19 Honor repeat them in the charge.
20 THE COURT: And then I'll say, "Counsel for
21 plaintiff in his argument emphasize the variety of fac-
22 tors indicating that the transactions should not be
23 characterized as a loan".
24 MR. ARISOHN: One other point, your Honor, and
25 that is because of the bifurcated way that this trial

has taken place, I believe the jury might be misled into believing that Mr. Hendrix received a windfall by the language in the last sentence of paragraph one on page four. As your Honor recalls what happened here, Mr. Hendrix paid a substantial amount of money for the equipment towards the purchase price of the equipment to the vendors.

THE COURT: He has testified to that.

MR. ARISOHN: Paid National Equipment Rental some $18,000.00.

THE COURT: He so testified.

MR. ARISOHN: I object to the language the plaintiff would --

THE COURT: What Paragraph?

MR. ARISOHN: Page four, paragraph one, last sentence.

THE COURT: All right, I'll take that out.

MR. POLLECK: If your Honor please, may I move at this point for a directed verdict on the grounds the defendant has failed to sustain its burden by fair preponderance of the evidence.

I submit that there is no evidence that National Equipment knew that Mr. Hendrix had in mind that he wanted a loan.

THE COURT: Denied.

MR. POLLECK: May I say one morething?

I would like to have overnight to prepare the closing.

THE COURT: I can't, I have a lot of other cases. I appreciate your dilemma. Bring in the jury.

I am going to return the charge to the other file because we have a xerox of it now.

MR. POLLECK: May we have ten minutes before we close.

THE COURT: All right, but let's put on the witness.

(Whereupon, jurors entered the courtroom and are now seated in the jury box.)

THE COURT: We are just going to put Mr. Jacobs on for the third time. He has another piece of evidence he wants to give you, then we will take a ten minute recess, then we will have summations.

(Mr. Jacobs was recalled by plaintiff attorney, Mr. Polleck.)

(Mr. Jacobs is now seated in the witness box after having been previously duly sworn by theClerk of the Court.)

REDIRECT EXAMINATION

BY MR. POLLECK:

Q How long have you been with National Equipment Rental as its general counsel?

A Since about 1974 or 75; and I have been with the company since 1965.

Q How long have you been admitted to the Bar of New York State?

A Approximately 14 or 15 years.

Q Will you tell us what your experience in practice of law has been since you were admitted?

MR. ARISOHN: Your Honor, I object.

THE COURT: He is qualified as an expert.

You may continue.

Q You are familiar with various types of security transactions entered into between creditors and debtors?

A Yes.

Q Will you explain, if you will, what a conditional sales contract is?

A A conditional sales contract is a contract wherein a party will sell equipment of merchandise or anything to another party on a time basis, over which he will receive a sum for the purchase price of the equipment, plus a rate of interest over that period of time.

Q And a purchase money mortgage?

A And a purchase money mortgage is where a third party will supply the funds for the purchase and acquisition ofproperty that somebody wishes to buy and he will receive in turn therefore a monthly payment or whatever time payments there are plusan interest rate.

MR. POLLECK: Ok, thank you, that's all.

RECROSS-EXAMINATION

BY MR. ARISOHN:

Q Mr. Jacobs, the agreements in question here are not termed purchase money mortgages, are they?

A No.

Q And the agreements in question here are not termed conditionalsales contracts, are they?

A No.

Q In fact you contend that they are leases, don't you?

A Yes.

MR. ARISOHN: No further questions.

THE COURT: All right, step down.

All right now, we'll take a ten minute recess.

What I am going to do is have you have the summations, the charge, then you will begin deliberations. Would you prefer deliberating tonight or coming back in

the morning to deliberate? I would have to send you out for dinner between quarter to six and eight o'clock and then you could deliberate into the night. What would you prefer to do? Talk about it yourselves. If you wish to work tonight then you could call your homes.

(Whereupon, a ten minute recess was had.)

(After recess.)

THE COURT: Bring in the jury.

(Whereupon, jurors enter the courtroom and are now seated in the jury box.)

THE COURT: Well, what are we going to do about dinner?

THE FOREMAN: We are going to have it at home.

THE COURT: All right, we'll have the summations.

MR. POLLECK: Ladies and gentlemen, you have heard all of the testimony in this case; you have read all of the documents or you will have an opportunity to read them over while you are deliberating.

Now, let's consider what it is that we have heard and read. Remember that the issue here, I think everybody agrees what the issue is here, whether or not this was a loan or some other type of transaction. Number one, it's pretty clear, I think, that the plaintiff National Equipment Rental never issued its

check, never forwarded any monies to defendant Hendrix as a loan.

Number two, Mr. Hendrix did not sign any promissory note; he did not sign any loan application, he did not sign any documents at all with the word "Loan" on it. What he did sign -- in fact, the two major documents which are exhibits 1 and 2, what are called lease agreements, and the payments they call for are called rentals. Now, to be sure that's not conclusive, it's not decisive on the issue of whether or not it's a loan. You are entitled to look behind it, but it is something to consider. It is something to consider seriously, particularly what the defendant thought he was getting into; what kind of transaction he thought he was making. You must remember too, thatwhat the plaintiff did was to issue its checks to Western Carolina Tractor Company and to Jeff Hunt Machinery Company, the two vendors who Mr. Shoup testified whom he knew owned the equipment, and they issued their checks after first issuing their purchase order at a stated price and receiving invoices from each of the vendors; invoices at that same stated price and those checks in that exact amount in each case was issued to each of the vendors.

We must also remember that Mr. Hendrix'signed

1 request for the plaintiff to purchase this equipment.
2 He also signed authorizations for the plaintiff to go
3 ahead and issued its checks in payment of this equipment
4 to the vendors. Mr. Hendrix never made any request of
5 anybody that he knew to be connected with National
6 Equipment Rental for a loan of money. He admitted in
7 fact that his primary concern was for an extension of
8 time for payment that he was already making under other
9 leases, and as far as the testimony of the representatives
10 of the plaintiff is concerned, this was unknown to them
11 in the first place, so his need was for the equipment
12 not for a cash loan, not for money, cash over and above
13 the cash he already had. His need was to be able to keep
14 this equipment, which he already had and never tells
15 anybody he knew was a representative of plaintiff that
16 he had.
17 He never told anybody from plaintiff that he
18 wanted to make a loan, that he already owned this equip-
19 ment. He told them that was the Carolina Tractor Company
20 and Jeff Hunt Machinery had this equipment, at least
21 that's what was told to Mr. Shoup as a representative
22 of the plaintiff.
23 I am fairly confident that Judge Weinstein will
24 instruct you that the burden of proof in this trial is
25

1 on the defendant, or Mr. Hendrix, to establish to your
2 satisfaction and clearly that both parties, the plain-
3 tiff as well as the defendant, considers these trans-
4 actions to be loans rather than some other type of
5 transaction, rather than a lease or conditional sale
6 contract or a purchase money mortgage.
7 Now, consider what Mr. Hendrix has established,
8 that he thought he was taking out a loan of money.
9 Well, he certainly testified enough that he spoke to his
10 wife about their taking out a loan for this equipment,
11 but from what you heard I ask you to consider -- do
12 you consider that lightly, no less dear.
13 Don't forget National Equipment paid each of
14 the vendors for this equipment, they paid a total of
15 $115,000.00 for the equipment; and wouldn't it have
16 been easy for Mr.Hendrix to think if I call this a loan
17 I can get out of paying them back, I don't have to
18 pay them anything, so all that he has to do is come in
19 and testify at the trial, he thinks that this is a loan,
20 but in point of fact, remember his admissions, he
21 never told anybody that he knew -- representative
22 plaintiff--that even he was considering that this was
23 a loan.
24 What about proof of that plaintiff or any representa
25

1 tive of plaintiff considered that it was making a loan?
2 Is the evidence clear on that?
3 I submit to you that it isn't even likely. The
4 defendant has introduced no testimony whatsoever that
5 anybody from plaintiff knew that this was a loan.
6 Yes, they got a concession that the rental rates are
7 figured on the basis of some basis of return, but
8 consider, if you will, what transaction, what commercial
9 transaction isn't talked about in terms of percentages.
10 Isn't even a resale of goods by a retail store figured
11 on a percentage of profit on margin of profit in terms
12 of a percentage mark-up. That doesn't mean that this
13 was in the nature of interest or that plaintiff thought
14 that it was in the nature of interest; and the
15 defendant's testimony and Mr. Arisohn's cross-examination
16 of Mr. Jacobs mentioned the word "Interest" a number
17 of times. Mr. Arisohn read to Mr. Jacobs a statement
18 from a form filed by the plaintiff with the Securities
19 Exchange Commission thatallegedly said that the plain-
20 tiff's figures interest into its rental charges, but
21 you heard Mr. Jacobs' testimony that that interest,
22 the use of the word "Interest" in that statement meant
23 only the interest that plaintiff pays on the money
24 that it borrowed as part of its normal overhead in
25

1 figuring what kind of a return it must get from rentals
2 in any other income that it makes.
3 Now, what about Mr. Hendrix' testimony that he
4 thought Mr. Kelly was a representative of the plaintiff.
5 Well, that's what he said here,but I hope you were
6 listening carefully when I read into evidence his testi-
7 mony that he had given at the examination before trial
8 and at the first trial of this action. He knew Mr.
9 Kelly worked for J&M Financing, whatever it was; he
10 knew Mr. Kelly before hand. Mr. Shoup on the other
11 hand testified, although Mr. Kelly came to him he had
12 never met him before. It's very obvious that Mr. Kelly
13 came to Mr. Shoup acting on behalf of Mr. Hendrix,
14 not on behalf of the plaintiff. Mr. Hendrix knew
15 who Mr. Kelly was. This was a small town of a thousand
16 people, and he admitted that he knew Mr. Kelly before.
17 He knew what business Mr. Kelly was in. Mr. Kelly
18 came there with the salesman from the Western Carolina
19 Tractor Company, Mr. Hanna, and these were the two
20 people Mr. Hendrix dealt with; not with the representat-
21 ive of National Equipment Rental. These two people,
22 Mr. Reed Hanna who he knew to be a salesman from Western
23 and Mr. Kelly who he knew was connected with J&M
24 Company were the people he attempted to make the loan
25

with. You heard Mr. Shoup's testimony that Mr. Kelly never told Mr. Shoup that Mr. Hendrix wanted to make a loan, neither did Mr. Kelly ever tell Mr. Shoup that the equipment -- if Mr. Kelly knew it -- was already in Mr. Hendrix' possession.

What about the fact as Mr. Arisohn tried to bring out, that the plaintiff requested credit information on Mr. Hendrix before entering into this transaction. Does that mean that this is a loan? Haven't we all entered into other types of transactions where credit information is required? Haven't we all been asked for credit information? Hasn't our landlors asked us some personal information about ourselves, some references and so on, that doesn't make this a loan in plaintiff's mind by a longshot.

You heard Mr. Jacobs testify that the rate of return that it seeks in its rental charges based upon overhead, based upon the interest, is based on money it borrows and it's based on other expenses that it has. I submit to you that that definitely sounds more like someone in the sales and rental business than it does in the business of making money, because in the business of making money, what do people consider? They consider only a set rate on an amount

borrowed.

Now, you've heard some testimony from Mr. Jacobs at the very end, if you recall back, about other forms of transactions such as conditional sales contracts and purchase money mortgages. The issue again before you is whether this was a loan on the one hand or some other type of transaction. Yes, you heard plaintiff's testimony that it considers this to be a lease, but consider too, if you will, whether it might not be one of the other types of transactions that Mr. Jacobs described. Remember primarily it is the intention of both parties, both defendant and plaintiff that you are going to have to decide. I am sure that you will be instructed as to that, their intentions as to what this transaction was; and please consider all the evidence, all of the testimony you have heard. Look carefully at all of the documents you have before you; the rental agreement calls itself a rental agreement and calls for the payment of use taxes on rental.

You heard Mr. Jacobs testify that use taxes are required by the State of South Carolina on rentals. You heard Mr. Jacobs testify that National Equipment put its resale number on the purchase order because

in order to get an exemption from a sales tax, because it was either reselling or releasing, that is reletting this equipment, was either going to sell it again or lease it again.

Do any of those factors at all mean to you that plaintiff thought it was loaning money to the defendant, and consider particularly the plaintiff's intention. I submit to you that it is impossible, it is virtually impossible to draw that conclusion.

Again I ask you to remember the evidence, the oral testimony that was given, and please look at all of that documentation carefully, the two main agreements, the purchase order, the authorization for Mr. Hendrix to buy the equipment; the authorization from plaintiff to pay for the equipment; the checks plaintiff issued in payment of the invoices; and please draw the logical conclusion. Thank you.

MR. ARISOHN: You Honor, Mr. Polleck, Mr. Hendrix, Mr. Foreman and Ladies and Gentlemen of the Jury. His Honor will instruct you that the burden of proof in this case is on Mr. Hendrix, on the defense to establish by clear evidence that the transaction involved here is a loan. I submit to you that we willingly accept that burden because as

I go through the evidence and show you what we contend the evidence shows, I think it is inescapable what the true transaction here was as a loan.

Now, throughout the trial you heard Mr. Jacobs and his lawyer refer to these things as leases, and the documents themselves called leases. You have them, you see they say leases on it. Thereis nothing serious. Of course, they are called leases, they are not going to call them loans. We are not going to go ahead and call these things loans. Judge Weinstein will instruct you tomorrow that a transaction must be judged by its true character, what something calls itself is not going to be a factor which controls.

The issue you have to decide is whether it would have called itself was true or what it called itself was a subterfuge to hide what we say is to advance money, and what defendant has considered to be a usurious interest rate.

I submit, ladies and gentlemen, that the evidence in this case establishes that National performed one function, it was the source of money. You heard from two separate people in this case, Mr. Jacobs and Mr. Shoup, sitting in the back there now. What I asked both of them, what does National Equipment do, and the

1 answer from both was that it advances money, sells money.
2 Does that sound like a landlord, or does that sound
3 like a banker, like a lender; think about it.
4 Let's talk about these transactions. You take
5 a look at these documents in question, what does the
6 evidence show? The evidence shows that Mr. Hendrix
7 had two pieces of equipment that he was buying from
8 two different companies, $5,200.00 a month to one
9 company; and $2,000.00 a month to another company.
10 He couldn't make the payments, so what did he do, he
11 talked to the salesmen from one of the companies and
12 says I can't make the payment, that's Mr. Hanna, the
13 salesman from Western Carolina company. Mr. Hanna
14 goes out and comes back with Pat Kelly. It's very
15 interesting, what does National do about Pat Kelly?
16 They try to hide behind him -- oh no, what he did doesn't
17 concern us, he's some guy out there working for Mr.
18 Hendrix. You take a look at this exhibit and tell
19 me who he is working for. Here's a check, I'll provide
20 you with a copy, Check Number 3246 on the checkbook
21 of National paid to the order of Robert P. Kelly and
22 his company there, Southeastern Capital. He was
23 working for Mr. Hendrix. Is that believable? He was
24 an agent and a representative of National. He came
25

to Mr. Hendrix with the documents, here they are. He said to him, Here are the documents. Mr. Hendrix says, Well, these are the documents, but they don't say leases, I don't need a lease, that's somebody who has a tax write-off, I need a loan. Mr. Kelly says, This is the way National lends money. That's the guy who National Equipment is paying $2,437.00, comes to Mr. Hendrix with these documents and Mr. Hendrix said I don't want a lease, I want a loan and Mr. Kelly says, This is the way National lends money; what could be more clear?

Take a look at the arithmetic involved here also. Hendrix owed on one piece of equipment, $31,000; on the other piece $84,000 some odd. The plaintiff makes a big deal thatthe money that National gave out was not given out directly to Mr. Hendrix, it was given out to these two companies.

(continued next page)

1 Is that going to make a difference whether they gave
2 the money to these two companies or they gave it
3 directly to these two companies; that's another part
4 of this subterfuge that doesn't change the real trans-
5 action. The real transaction was they provided the
6 funds to enable Mr. Hendrix to purchase the equipment,
7 $31,000 paid back to this company at $86.29 a month.
8 Where do they get that figure from? They take the
9 prime percentage rate, they jack it up and they multiply
10 it by the amount they forward. When you go into the
11 jury room take a look at these L. I. P. sheets that
12 Mr. Jacobs told you was the process sheets they use
13 internally. Take a look at what the prime rate is;
14 one is 11 percent, another 11 and a half percent and
15 the line directly above that is what, 15-3/4 percent
16 and 17 percent, tell me that that's not interest.
17 Mr. Jacobs says it's not interest, it's a rate of re-
18 turn. Why would they be comparing it to what the
19 prime rate of interest is? Mr. Polleck says it doesn't
20 make any difference. Mr. Jacobs says they don't get
21 interest payments, and I confronted him with a state-
22 ment his company makes in a document filed with the
23 S.E.C. which says "Finance leases -- " and by the
24 way, it's interesting to note that the division of
25

his company which writes these so-called leases is called the finance division, finance leases return to National Equipment Rental. The invoice cost on the equipment plus interest charges. He tells you that those interest charges are interest charges that their lenders charge them, another subterfuge; is that believable?

On the other agreement going back to this first one, $31,000 they advanced required Mr. Hendrix to make 49 payments at $86.64, which comes out to $2,000. Mr. Hendrix was required to pay more than they paid for the equipment. Does that sound like alandlord collecting rent? The same thing on the other equipment, $84,000 they outlaid, Hendrix had to pay $2,000 which was over $15,000, does a landlord charge more than the apartment cost, think of it, the loan.

Let's talk about some of the other factors here which are indicative of whether National Equipment Rental is in the business of selling money at interest rates, advancing money, making loans or leasing equipment. What did the witness testify to? Does National have any showrooms, clearly not. Does National do anything with respect to this equipment other than write a document? They didn't inspect it, they didn't

1
2 look at it, they didn't care what it was, all they
3 were interested in was that man's credit. They wanted
4 this man to take the money that they were going to
5 advance to buy this piece of equipment and pay them
6 back monthly. They had no interest whatsoever in any
7 of the equipment. Mr. Hendrix under the terms of the
8 contract -- and you should try to read these things
9 to see what obligations were imposed on him, and what
10 obligations were imposed on them. Theonly obligation
11 they had was to collect the monthly payments. Does
12 that sound like a bank or a landlord?
13 I submit to you it sounds like a bank. A land-
14 lord is required to fix the equipment if it goes broken.
15 This company had no facilities to fix the equipment and
16 it deals in all sorts of other kind of equipment, any-
17 thing they can lease, write one of these so-called
18 lease agreements on. The fact that they do, they lend
19 money and they take a security interest in the equipment,
20 whatever it may be, they don't care and they require
21 the borrower to pay them back at a monthly payment which
22 includes interst. What are the other factors here?
23 It's also interesting that at the end of these agree-
24 ments what was going to happen was that National was
25 going to take back the equipment, find some person to

1 rent it to because this one case they made Hendrix sign
2 an agreement which obligated him to purchase it, which
3 he wanted to do because as he testified, the purchase
4 price was going to be far less than the fair value was,
5 and he was going to do that. Did National have any
6 interest in taking this piece of equipment back,
7 absolutely not.
8 Now, Mr. Shoup came in here and testified that
9 he would consider this whole thing a little differently
10 if he knew that Mr. Hendrix had possession of the
11 equipment at the time that he wrote these documents.
12 In that case he said it might have been a loan but what
13 is the testimony here. What is the testimony? Isn't
14 it the testimony that Mr. Hendrix had possession of
15 this equipment that he had for four or five months
16 when he was making payments to these two other companies
17 when National got involved they didn't even look at
18 the equipment. He had the equipment for four or five
19 months. It's interesting also that during Mr. Shoup's
20 testimony, and you could ask to have the transcript
21 read back, I caught it. It slipped out of his mouth
22 when we proved the loan. Now your recollection of the
23 testimony is what controls not mine, but ask to have
24 it read back when we approved the loan.
25

Lastley, during the course of the trial you heard Judge Weinstein instruct you no matter who's rich or who's poor that doesn't enter into your calculations because all parties in this courtroom are equals. I agree with that because you people in the jury are the equalizer out there in the real world. When this company came to Mr. Hendrix they were not equals, they presented him with a form contract. They said sign it because it's in your interest, and this is the way we loan money. In here they are equals. Don't let them hide behind this form that says a lease, and don't let them hide behind their supposed non-agreement with this man's name Pat Kelly. That check proves what the agreement was. Pat Kelly worked for them; Pat Kelly told Hendrix, this is the way this company loans money. I submit to you they could come in and say that's a lease if they think that doesn't work they will come in and say some third thing, but the fact of the matter is it was a loan and there is no getting around it.

I submit to you when you consider all of these factors tomorrow after hearing Judge Weinstein's charge, you'll find that the transactions here were indeed loans and you'll find for the defendant. Thank you

very much.

THE COURT: Now, do we have all the documents?

MR. ARISOHN: I can't give them copies on the ones I have.

THE COURT: You will give it to them in the morning.

Don't discuss the case with anybody. Don't ask your wife or husband what they think or your lawyer, just read them to yourselves and bring them in tomorrow and I'll see you at 9:45. Have a pleasant evening. Good night.

(Whereupon Court stood in recess for the day in this matter.)

* * * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

NATIONAL EQUIPMENT, :

-against- : 75 C 26

HENDRIX, :

Defendant :

----------x

UnitedStates Courthouse
Brooklyn, New York

April 7, 1977
10:00 o'clock A.M.

B e f o r e:

HON. JACK B. WEINSTEIN, U.S.D.J.

HENRY LEGENDRE
ACTING OFFICIAL COURT REPORTER

1

2 A p p e a r a n c e s :

3

4 JONATHAN POLLECK, ESQ.
5 Attorney for Plaintiff

6 MARK S. ARISOHN, ESQ.
7 Attorney for Defendant.

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MR. POLLECK: I have two preliminary matters and one supplemental request.

THE COURT: Yes, gentlemen, is there an application?

MR. ARISOHN: Yesterday and prior to summations your Honor had stated thatyou assumed motions were made and denied, and then Mr. Polleck made a verbal motion and you assumed that included the defendant.

THE COURT: Yes.

MR. ARISOHN: At the prior trial I made a motion to conform the pleadings to the proof. Just so there is no question about the record I make the same motion here.

THE COURT: It was agreed -- I forget whether we put it on the record -- that I would determine attorney fees if we should come to that task.

MR. ARISOHN: Two times during the trial yesterday you instructed the jury as to the limited effect hearsay testimony should be given. Now, there is one bit of testimony concerning statements made to Mr. Hendrix by a Mr. Kelly, and I believe the evidence to be that Mr. Kelly was an agent of National Equipment Rental, and I would ask your Honor to instruct the jury that that statement by Kelly as an agent of

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National Equipment Rental is not hearsay under the rules of evidence, 801D -- I don't believe there was a question of fact that he was an agent. If your Honors believes that then you might instruct the jury if they find he was an agent --

THE COURT: I have to make that determination myself. I believe Mr. Kelly was an agent.

MR. POLLECK: There is no evidence that he was an agent -- an independent contractor for J. M. Leasing Company.

THE COURT: Did he get a commission?

MR. POLLECK: That he did.

THE COURT: I'll stay with my prior ruling that he was not an agent for purposes of the hearsay rule.

MR. ARISOHN: If I might expound on the record ---

THE COURT: He was a broker.

MR. ARISOHN: He was a broker. He received a commission from this company. He also was the person that dealt with my client on behalf of National Equipment. He brought the papers from National Equipment to my client.

MR. POLLECK: He dealt with National Equipment on behalf of Mr. Hendrix.

MR. ARISOHN: It seems to me that National Equipment can hardly shield itself from its statement -- from using an independent broker who receives a commission, and who acts as an agent of National Equipment. I would think they would be bound by statements that he made in the course of acting as an agent.

THE COURT: He was defendant's agent rather than plaintiff's agent at the time of the critical discussions after commission was paid. My ruling is fair. It would just confuse the members of the jury at this phase.

Bring in the jury.

(Whereupon the jurors entered the courtroom and are now seated in the jury box.)

THE COURT: Any objection to my discharging the alternates?

The alternates will not be required. I appreciate very much your attending and being here. The attorneys have stipulated that you may be discharged, so please do not discuss the case with anyone until after the verdict is in and report downstairs. Thank you.

(continued next page)

THE COURT: Ladies and Gentlemen of the jury:

It is now my duty as judge to instruct you as to the law and how it applies in this case. It is your duty as jurors to follow the law as I state it. You are to decide the issues of fact and apply the law to the facts. If you have any notion of your own as to what the law is or should be, disregard it.

You will determine the facts in this case from the evidence submitted in the form of testimony, from the depositions, and exhibits. In making these determinations, you will draw reasonable inferences based upon your practical knowledge of the world. Having observed the witnesses you will decide how credible they are and how much weight, if any, should be given to parts or all of the testimony.

Questions of the lawyers, arguments of the lawyers, or what I say, is not evidence. Any views I or the lawyers express as to the facts are ours, not necessarily yours, and you are free to entirely ignore them. Decide the facts yourselves, not as you think I or anyone else might like you to. All parties must be treated equally, none is entitled to sympathy.

In the course of the trial it has been necessary for me to rule on the admission of evidence and on

motions made with respect to the applicable law. You must not infer from any such ruling that I have made or from anything I have said during the course of the trial that I hold any views for or against any of the parties to this lawsuit.

The defendant has raised usury as an affirmative defense. This means that the burden of proof on that issue, the only one before you, rests on the defendant.

When we say that a party has a burden of proof upon an issue, we mean that with respect to that issue that party must convince you by the preponderance that its contention is true. This is a higher standard of proof than that in most civil cases where a mere preponderance of the evidence or of the probabilities is enough. In making that determination you can consider any of the evidence in the case no matter who introduced it.

You cannot assume that the parties intended to enter into an unlawful, that is to say, usurious agreement.

The issue is whether this was a loan. The usury laws of the state of New York by which this contract is governed limits the legal rate of interest chargable on loans. The parties have agreed that if, in fact,

this is a loan, then the rate of return was usurious and the action must be dismissed. If you find that it was a loan your verdict will be for the defendant; otherwise the verdict will be for plaintiff.

Plaintiff denies that a loan of money was made and asserts that the transaction was a bona fide lease of equipment or a conditional sales contract for purchase money mortgage. When usury is relied upon as a defense, the transaction must be judged by its real character rather than by the form in which the parties have seen fit to cast it. Period. The intention of the parties themselves is paramount.

The defendant has the burden of proving that the parties intended the transaction to be in truth and in fact one for a loan of money, even though they cast the transaction in the form of a lease of equipment.

Intention is a subjective matter. It is a state of mind. In ascertaining the intentions of the parties you should consider not only the testimony of the parties themselves, but their conduct and their actions before and after the execution of the written agreement insofar as you consider that it bears upon their intentions. A secret intention of one party does not

make a transaction a loan if the other indications show that it is a lease.

In seeking to determine whether a loan of money was intended by both parties, you will bear in mind that a loan of money occurs when a lender advances money for the use of a borrower, under an agreement that the money will be repaid at a specified future date. Counsel for defendant in his agreement emphasized the variety of other factors in the case that defendants contend point to the loan characterization. Usually a borrower pays interest for the use of the money.

On the other hand, a lease of equipment occurs when the owner of the equipment permits another to use it for a specified period of time in consideration for which the owner usually receives rent. Mr. Jacobs testified with respect to conditional sales and purchase money mortgages agreement for plaintiff in his argument emphasized the variety of factors indicating that the transactions should not be characterized as a loan.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind,

and his demeanor and manner while on the stand or the manner of his testimony, if he gave a deposition. Consider also any relation each witness may bear to either side of thecase; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

If you find that any statement made by a witness on the stand is false, in whole or in part, you may disregard the particular part you find to be false or you may disregard his entire testimony as not worthy of belief.

An expert witness may give his opinion and its value depends upon his qualifieations, experience and interest and the facts on which the opinion is based. In applying opinion evidence, you may disregard the opinion if the facts assumed by the witness as the basis of his opinion have not been established by a fair preponderance of the credible evidence.

If you do not remember any of the testimony and you want it read, send in a note through the marshal and I will have the reporter read whatyou want. It may take some time for us to locate the portion of the

reporter's notes and to get everyone together so do not get impatient. Reading testimony is time consuming so try to pinpoint what you want.

If you have any questions about the applicable law and you want a further explanation from me, send me a note.

You will not discuss this case with anyone outside the jury room. Ifyou have to communicate, you will do it in writing to me through the marshal.

Each one of you is entitled to your own opinion, but you should consider each other's opinions carefully. Listen to each other, and do not hesitate to change your opinion if you are convinced that you are wrong.

The verdict in this case has to be unanimous.

Now, I am going to ask you to retire in just a few minutes, but for the moment I want counsel to come to the side bar in case I have forgotten anything they want me to tell you.

(Whereupon a sidebar conference was had.)

MR. ARISOHN: Aside from the comment I had yesterday, I respectfully object to the charge insofar as your Honor spoke about secret intention of parties. It seems to me what's at issue here is

whether the real intent of both parties was to make a loan transaction. Under the charge it may seem that the intent of National to make a loan was secret becasue they characterized their transaction as a lease when in point of fact that was their real intention, and if by giving the agreement to Mr. Hendrix in a lease form their overt intent is stated as a lease the jury may find their secret intent was a loan, and under your instructions they would find for the plaintiff.

THE COURT: What would you want me to say to them?

MR. ARISOHN: I would ask your Honor to instruct the jury that one of the issues they have to decide is whether the real intent ofthe parties here was to make a loan and whether that intent was expressed or not expressed is not the deciding issue.

(Whereupon sidebar conference was concluded.)

THE COURT: The deciding issue is what the real intent of both parties were with respect to this matter.

All right, swear the marshals, please.

(Whereupon a U.S. Marshal was sworn in by the Clerk of the Court.)

THE COURT: All right, retire and consider

your verdict. You have all the documents, now I believe

(Whereupon jurors were excused from the courtroom to begin deliberating.)

THE COURT: Have you Court Exhibit A?

MR. ARISOHN: The signature of the wife appears on the guarantee of payment, which is Plaintiff's Exhibit 5 which was referred to in the case. I would like to hand it in to the jury.

THE COURT: Is that already before them?

MR. POLLECK: It is not.

Your Honor mentioned in your charge that the wife is a defendant also. I think the jury is confused what the wife's responsibility is.

THE COURT: It doesn't have any effect whether its' a loan or not.

MR. ARISOHN: If Your Honor would instruct them that Miss Hendrix did sign a guarantee --

MR. POLLECK: I think that document would be prejudicial to the issue.

THE COURT: What about my writing out Mrs. Hendrix did sign a guarantee but this is not an issue. That is not an issue in this case.

I'm returnign Court Exhibit A to the marshal with my answer on the back.

(Whereupon Court stood in recess.)

(After recess.)

THE CLERK: Jury Note marked Court Exhibit 9.

THE COURT: Bring in the jury.

(Whereupon jurors enter the courtroom and are now seated inthe jurybox.)

THE COURT: Mr. Clerk, take the verdict, please.

THE CLERK: Mr. Foreman, please rise.

Mr. Foreman, will you tell us your verdict?

THE FOREMAN: We decided it was a loan.

THE COURT: Be seated.

Poll the jury, please.

THE CLERK; Mr. Foreman, and Ladies and Gentlemen of the Jury, you say that you have decided that it was a loan; yes or no, is that your verdict?

JUROR NUMBER ONE: Yes.

THE CLERK: Is that your verdict?

JUROR NUMBER TWO: Yes.

THE CLERK: Juror Number Three; is that your verdict?

JUROR NUMBER THREE: Yes.

THE CLERK; Juror Number Four; is that your verdict:

JUROR NUMBER FOUR: Yes.

THE CLERK: Juror Number Five; is that your verdict?

JUROR NUMBER FIVE: Yes.

THE CLERK: Juror Number Six; is that your verdict?

JUROR NUMBER SIX: Yes.

THE COURT: Is there any reason why the jury should not now be discharged?

Thank you very much madam and gentlemen. Report downstairs now please.

(Whereupon jurors were excused from the courtroom.)

THE COURT: Based on the jury's verdict I believe I have no alternative but to dismiss the complaint.

MR. ARISOHN: I would so move.

MR. POLLECK: I move for a judgement in favor of the plaintiff determining thatthis was not a loan notwithstanding the verdict on the basis of the weight of evidence and the defendant has not proved his case here.

THE COURT: The plaintiff's motion is denied. The defendant's motion for dismissal is granted.

MR. ARISOHN: Thank you, your Honor.

THE COURT: Without cost or disbursements.

MR. ARISOHN: Need I submit a judgement for signature?

THE COURT: I don't believe it's necessary. The Court will prepare an order.

I'll order the case closed.

(Whereupon Court stood in recess in this matter for the day.)

* * * * *

A-170

PLAINTIFF'S EXHIBIT 1 - LEASE DATED APRIL 30, 1974

NATIONAL EQUIPMENT RENTAL LTD. (LESSOR)

P.O. BOX 3473 NORTH NEW HYDE PARK, N. Y. 11040 (212) 343-1000

A MEMBER OF THE FLYING TIGER GROUP

LEASE NUMBER 50-205

SCHEDULE A

NAME AND ADDRESS OF LESSEE

H. WALTER HENDRIX, III
Route 1
Box 207
Lexington, S.C. 29072

(CHECK ONE) ☐ CORPORATION ☐ PARTNERSHIP ☒ PROPRIETORSHIP TELEPHONE NO. 803-356-3402

NAME OF PERSON TO CONTACT H. Walter Hendrix, I

QUANTITY	DESCRIPTION OF LEASED EQUIPMENT (INCLUDE NAME AND ADDRESS OF VENDOR)	
1	International Model TD-15 Series C, Power Shift Crawler Tractor Serial No. 1390 (Western Carolina Tractor Co. P.O. Box 9068 Columbia, S.C. 29290)	

PLAINTIFF'S EXHIBIT 1 EV

THIS LEASE HAS BEEN ASSIGNED TO THE FIRST NATIONAL BANK OF CHICAGO, AS AGENT, AS COLLATERAL SECURITY FOR INDEBTEDNESS TO CERTAIN BANKS UNDER A REVOLVING CREDIT AND TERM LOAN AGREEMENT DATED AS OF MARCH 1, 1973

LOCATION OF EQUIPMENT same

TERMS OF RENTAL PAYMENTS

INITIAL RENTAL	INITIAL TERM	ADVANCE RENTALS	SECURITY DEPOSIT	RENEWAL RENTAL
$ 866.29 + tax PER MONTH FOR THE FIRST 49 MONTHS $ --- FOR THE NEXT --- MONTHS $ --- FOR THE NEXT -- MONTHS	49 MONTHS	$ 1,732.58 +tax PAYABLE ON THE SIGNING HEREOF TO BE APPLIED TO THE 1st & 49th MONTHS RENT	$ --	$ ---- PER MONTH ANNUM

TERMS AND CONDITIONS OF LEASE

NATIONAL EQUIPMENT RENTAL LTD. ("LESSOR") hereby leases to the undersigned Lessee, and Lessee hereby leases and rents from Lessor, the equipment listed above and additional lease schedules which may be executed by the parties at a later date (hereinafter collectively called "Schedule") subject to the terms and conditions set forth below and continued on the reverse side hereof.

1. TERMS AND RENTAL NOTICES: Subject to the conditions herein stated, this lease shall be for the initial term stated above commencing with delivery to Lessee, its agent or a carrier, whichever shall be earlier. Lessee agrees to pay the total rent for the initial term, which shall be in the total amount of all rental payments stated above, plus such additional rentals as are provided herein. All payments shall be made in advance at the address specified by the Lessor in its monthly invoice.

2. TITLE: Lessor shall at all times retain title to the equipment. All documents of title and evidences of delivery shall be delivered to the Lessor. Lessee will not change or remove any insignia or lettering which is on the equipment at the time of delivery or which is thereafter placed thereon indicating Lessor's ownership thereof, and at any time during the lease term, upon request of Lessor, will affix to the equipment, in a prominent place, labels, plates or other markings supplied by Lessor stating that the equipment is owned by Lessor. Lessor may at Lessee's expense cause this lease to be filed, recorded, refiled, rerecorded or financing statements (which may be signed by the Lessor only if permitted by statute) to be filed as permitted or required by law. Lessee at its expense shall protect and defend Lessor's title, at all times keeping the equipment free from any legal process and/or encumbrances whatsoever, including, but not limited to liens, attachments, levies and executions, and shall give Lessor immediate written notice thereof and shall indemnify Lessor for any loss caused by the failure of the Lessee to take action as provided herein.

3. PURCHASE, DELIVERY AND PREPAYMENTS: Lessee requests Lessor to purchase the equipment from the vendor selected by Lessee. If Lessee request Lessor to make any payments to vendor or supplier, or if Lessor makes any such payment prior to delivery and acceptance, and if Lessee for any reason does not accept the equipment, Lessee shall, on demand by Lessor, pay Lessor any amounts theretofore paid or owing by Lessor in respect to the purchase of such item of equipment and upon such payment, Lessee shall be subrogated to Lessor's claims, if any, against the manufacturer or other supplier thereof and Lessee shall become entitled to such item, as-is where-is, without warranty, express or implied, by the Lessor with respect to any matter whatsoever, and Lessee shall indemnify and save Lessor harmless from any and all liability to the supplier thereof.

4. EXECUTION; LAWS GOVERNING; SERVICE: This lease shall only be binding when accepted by the Lessor at its North New Hyde Park, N.Y. office and shall be deemed to have been made in Nassau County, New York and shall be governed by the laws of the State of New York except for local recording statutes. As part of the consideration for the Lessor's executing this lease, Lessee agrees that all actions or proceedings arising directly or indirectly from this lease shall be litigated only in courts having situs within the State of New York and the Lessee hereby consents to the jurisdiction of any local, state or federal court located within the State of New York and waives personal service of any and all process upon the Lessee herein, and consents that all such service or process shall be made by certified mail, return receipt requested, directed to the Lessee at the address hereinabove stated; and service so made shall be complete two (2) days after the same shall have been posted as aforesaid.

THE ADDITIONAL PROVISIONS ON THE REVERSE SIDE HEREOF WHICH HAVE BEEN READ BY LESSEE ARE INCLUDED IN AND MADE A PART HEREOF. LESSEE ACKNOWLEDGES RECEIPT OF A SIGNED, TRUE AND EXACT COPY OF THIS NON-CANCELABLE LEASE.

ACCEPTED, NORTH NEW HYDE PARK, N.Y.
ON 5/4 19 74

NATIONAL EQUIPMENT RENTAL, LTD. Lessor

By: [signature]

DATE APR 30 1974 19

NAME OF LESSEE H. WALTER HENDRIX, III

BY H. Walter Hendrix III TITLE

TITLE

TITLE

FILE COPY

5. CARE AND USE OF EQUIPMENT: Lessee, at its own cost and expense, shall maintain the equipment in good operating condition, repair, and appearance, and protect same from deterioration other than normal wear and tear, shall use the equipment in the regular course of its business only, within its normal capacity, without abuse, and in a manner contemplated by the manufacturer thereof, shall not make modifications, alterations or additions to the equipment (other than normal operating accessories or controls), without the written consent of Lessor, which shall not be unreasonably withheld; shall not so affix the equipment to realty so as to change its nature to real property and agrees that the equipment shall remain personal property at all times regardless of how attached or installed; shall keep the equipment on the premises where delivered, and shall not remove the equipment without the written consent of Lessor, which shall not be unreasonably withheld. All modifications, repairs, alterations, additions, replacements, substitutions, operating accessories and controls shall accrue to the equipment and become the property of the Lessor. Lessor shall have the right, during normal hours, to enter upon the premises where the equipment is located in order to inspect, observe or remove same, or otherwise protect Lessor's interest, and Lessee shall cooperate in affording Lessor the opportunity to do same. For the purpose of assuring Lessor that Lessor's equipment will be properly serviced, Lessee agrees to cause the equipment to be maintained pursuant to the manufacturer's standard preventive maintenance contract and/or recommendations. Lessee agrees that Lessor shall not be responsible for any loss or damage caused by error in programming or instructions to the leased equipment, nor shall Lessor be responsible for latent defects, wear and tear or gradual deterioration or loss of service or use of the leased equipment or any part thereof. Lessor shall not be liable to Lessee or anyone else for any liability, claim, loss, damage or expense of any kind or nature caused directly or indirectly by the inadequacy of the equipment, or any item supplied by the vendor or any other party, any interruption of use or loss of service or use or performance of any equipment, any loss of business or other consequence or damage, whether or not resulting from any of the foregoing.

6. NET LEASE: Lessee intends the rental payments in this lease to be net to the Lessor. Lessee shall comply with all laws and shall pay all taxes, including but not limited to sales and use taxes, excise taxes, personal property taxes and assessments, licenses, registrations fees, freight and transportation charges and any similar charges imposed on the ownership, possession, or use of the equipment during the term of this lease. Lessee shall pay to Lessor all costs and expenses including attorney's fees as hereinafter defined, storage, caretaking and repossession expenses in connection with the enforcement of Lessor's rights under this lease. In case any charges, costs, taxes or expenses required to be paid by the Lessee under this lease shall remain unpaid after the due date thereof, Lessor shall have the right but shall not be obligated to pay the same and to charge such payments with interest at the highest legal rate from the date of said payment, as additional rent, to be paid with the next rental payment. The rental set forth herein is based on the prime rate as of the date hereof. Lessee agrees that if there is an increase in the prime rate during the term hereof, the rental shall be increased in accordance therewith.

7. INDEMNITY: Lessee shall and does hereby indemnify and save Lessor harmless from any and all liability arising out of the ownership, selection, possession, leasing, renting, operation, control, use, maintenance, delivery and/or return of the equipment, including but not limited to, injuries causing personal injury, property damage and/or death but shall be credited with any amounts received by the Lessor with respect thereto from liability insurance secured by Lessee. That said indemnification shall include all costs and expenses including attorney's fees incurred by Lessor in connection with any suits or actions resulting from any such liability.

8. INSURANCE: Lessee shall keep equipment insured against all risks of loss or damage from every cause whatsoever for not less than the aggregate amount of unpaid total rent for the balance of the term of this lease, plus the residual value and shall carry public liability insurance, both personal injury in the amount of $100,000-$300,000 and property damage, in the amount of $25,000 covering equipment. All said insurance shall be in form and amount and with companies satisfactory to Lessor. All insurance for loss or damage shall provide that Lessor shall be the loss payee and that losses, if any, shall be payable to Lessor, and all such liability insurance shall be in the joint names of Lessor and Lessee. Lessee shall pay the premiums therefor and deliver to Lessor the policies of insurance or duplicates thereof, or other evidence satisfactory to Lessor of such insurance coverage. Each insurer shall agree, by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor, that it will give Lessor 30 days prior written notice of the effective date of any alteration or cancellation of such policy. The proceeds of such insurance, payable as a result of loss or of damage to equipment, shall be applied at the option of Lessor, (a) toward the replacement, restoration or repair of equipment which may be lost, stolen, destroyed or damaged or (b) toward payment of the obligations of Lessee hereunder. Lessee hereby irrevocably appoints Lessor as Lessee's attorney-in-fact to make claim for, receive payment of and execute and endorse all documents, checks or drafts received in payment for loss or damage under any said insurance policy. In case of the failure of Lessee to procure or maintain said insurance to comply with any other provision of this lease, Lessor shall have the right, but shall not be obligated, to effect such insurance or compliance on behalf of Lessee. In that event, all monies spent by, and expenses of, Lessor in effecting such insurance or compliance shall be deemed to be additional rent, and shall be paid by Lessee with interest at highest legal rate to Lessor with the next monthly payment of rent.

9. DEFAULT: If (a) Lessee shall default in the payment of any rent or in making any other payment hereunder when due, or (b) Lessee shall default in the payment when due of any indebtedness of Lessee to Lessor arising independently of this lease, or (c) Lessee shall breach any warranty hereunder, or (d) Lessee shall default in the performance of any other covenant herein and such default continues for 10 days after written notice thereof to Lessee by Lessor, or (e) Lessee becomes insolvent or makes an assignment for the benefit of creditors, or (f) Lessee applies for, or consents to, the appointment of a receiver, trustee, conservator or liquidator of Lessee or of all or a substantial part of the assets of Lessee, or if such receiver, trustee, conservator or liquidator is appointed without the application or consent of Lessee, or (g) petition is filed by or against Lessee under the Bankruptcy Act or any amendment thereto (including, without limitation, a petition for reorganization, arrangement or extension) or under any other insolvency law or law providing for the relief of debtors, then, if and to the extent permitted by applicable law, Lessor shall have the right to exercise any one or more of the remedies as provided hereafter.

REMEDIES: In the event of default, Lessor may at its option, (a) declare the entire amount of the unpaid rental for the full balance of the term of the lease due and payable, without further notice, whereupon the same shall become immediately due and payable, (b) without demand or legal process and without being guilty of trespass or conversion and without thereby rendering the Lessor liable to refund any sums received as a deposit or as prepaid rent and without constituting a termination of the lease or relieving the Lessee of its original obligation, enter into the premises where the equipment may be found and take possession of same and remove same, whereupon all rights of Lessee in such equipment shall terminate absolutely and (c) retain all prior payments of rent and sell the same at public or private sale with or without notice to Lessee, with or without having the equipment at the sale, at which sale Lessor may purchase all or any part of the equipment or relet the equipment for a longer or shorter term than the original lease, the proceeds of such sale or reletting, less the expenses of retaking, storage, repairing, reselling or reletting and attorney's fees as hereinafter defined, to be applied to the payment of the unpaid total rent for the balance of the term of this lease. Lessee shall remain liable for the balance of the unpaid rent. Lessee shall be liable for all expenses Lessor may incur in connection with the enforcement of any of its remedies herein, including without limitation, attorney's fees equal to 20% of the total unpaid balance or in any action to recover possession of Lessor's property, 20% of the value of said property.

All remedies of Lessor hereunder are cumulative and may, to the extent permitted by the law, be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed to be an election of such remedy or to preclude the exercise of any other remedy. No failure on the part of the Lessor to exercise, and no delay in exercising any right or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise by Lessor of any right or remedy hereunder preclude any other or further exercise of any other right or remedy. Whenever any payment is not made when due hereunder, the Lessee promises to pay to the Lessor or its assigns, not later than one month thereafter, an amount calculated at the rate of 12% per annum for such delayed payment and to make such payments as liquidated damages occasioned by such delay.

10. RISK OF LOSS: Lessee hereby assumes the entire risk of loss, from any and every cause whatsoever. In event of loss, Lessee at its expense and at Lessor's option shall either (a) repair the equipment, returning it to its previous condition, or (b) replace same with like equipment acceptable to Lessor and in good condition and equivalent value, which shall become the property of the Lessor, or (c) pay Lessor all unpaid rents or such unpaid rents as may be allocated to specific items of equipment. Upon replacement or payment, this lease shall terminate with respect to replaced or paid for equipment and Lessee shall take title to same on an as-is where-is basis. In case Lessee shall fail to repair, replace or pay for same, Lessor may repair at Lessee's expense, to be charged as additional rental.

11. OTHER COVENANTS: Lessee agrees that its obligations under this lease are absolute, and shall continue in force and effect regardless of the disability of the Lessee to use the equipment because of any reason whatsoever, including but not limited to, wear, act of God, government regulations, strike, loss or damage, obsolescence; breach of contract or warranty; failure of, or delay in, delivery, misdelivery and that its obligations shall not abate due to any claim or setoff against Lessor. Lessee warrants that the application, statements and financial reports submitted by it to the Lessor are material inducements to the granting of this lease and that any material misrepresentations shall constitute default hereunder. Lessee agrees that Lessor has made no warranties or representations, express or implied, including the warranty of merchantability, with regard to the equipment and that the equipment has been selected by the Lessee and is of a design, size, fitness and capacity selected by the Lessee and that the Lessee is satisfied that the same is suitable and fit for its purposes. Lessee agrees to procure for Lessor such estoppel certificates, landlord's and/or mortgagee's waivers or any other documents as Lessor or its assigns may reasonably request to effectuate the purposes of this lease. Lessee agrees to furnish its certified annual financial statements or any other information delivered by it to its banks, stockholders or other creditors and such other financial statements as the Lessor may require. Lessee agrees not to sublet or otherwise assign or transfer its rights and obligations hereunder without the written consent of Lessor, which consent shall not be unreasonably withheld, provided however that any consent to such assignment or transfer shall not release the Lessee from any liability hereunder. Lessee warrants that this lease has been duly authorized, that no provision of this lease is inconsistent with Lessee's charter or by-laws or any loan or credit agreement or other instrument to which Lessee is a party or which by Lessor or its property may be bound or affected. Lessee agrees that the Lessor may examine Lessee's books and financial records on due notice. Lessee hereby waives a trial by jury and the right to interpose any counterclaim or offset of any nature or description in any litigation between the Lessee and Lessor with respect to this lease, the property covered hereunder and the repossession hereof.

12. ASSIGNMENT: This lease or any equipment or any rents or other sums to become due hereunder may be transferred or assigned by Lessor without notice and in such event, Lessor's transferee or assignee shall have all rights, powers, privileges and remedies of Lessor hereunder and Lessee's obligations hereunder shall not be subject to any defense, offset or counterclaim available to Lessee against Lessor. This lease is subject and subordinate to any mortgage which now or hereafter may affect the leased equipment, except that so long as the Lessee is not in default hereunder, the Lessee shall be entitled to peacefully and quietly hold, enjoy, possess and use such equipment during the term specified herein.

13. REDELIVERY: At the expiration of this lease, Lessee shall at its expense deliver equipment to the Lessor at an address specified by Lessor within the continental United States and in the same condition as received, less normal depreciation and wear.

14. SECURITY DEPOSIT: The Lessor acknowledges receipt of the sum set forth above as a returnable deposit from the Lessee to secure the faithful performance by the Lessee of all obligations of the Lessee under the lease. The parties agree that at any time the Lessee is in default, Lessor may apply all or any part of said deposit to the payment of rentals due hereunder and should the Lessee fail to return any or all the equipment leased hereunder, the Lessor at its option, may elect to retain said deposit as liquidated damages.

15. ADDITIONAL SCHEDULES; AMENDMENTS: This lease and all other leases and schedules added hereto as designated by the lease number above shall be construed as one lease and a default on one lease shall be deemed a default on all leases between the parties. Except as provided herein, this lease contains the entire agreement between the parties, and may not be altered, modified, terminated or discharged except in writing. Where a noun form is used herein is inappropriate, the singular or plural form, whichever is appropriate, shall be deemed substituted therefor.

16. RENEWAL RENTALS: Lessee shall have the option, if Lessee is not in default hereunder, upon giving written notice to Lessor at least 30 days prior to the termination of the original or any renewal term of this lease to renew this lease for such term and at such rental as is specified in the schedule, payable in advance at the beginning of each such term.

PLAINTIFF'S EXHIBIT 2 - LEASE DATED JUNE 11, 1974

NATIONAL EQUIPMENT RENTAL LTD. (LESSOR)

P.O. BOX 3473 NORTH NEW HYDE PARK, N. Y. 11040 (212) 343-1000

A MEMBER OF THE FLYING TIGER GROUP

50-205
LEASE NUMBER
B
SCHEDULE

NAME AND ADDRESS OF LESSEE

H. WALTER HENDRIX, III
Route 1
Box 207
Lexington, S.C. 29072

(CHECK ONE) ☒ CORPORATION ☐ PARTNERSHIP ☐ PROPRIETORSHIP TELEPHONE NO. 803-356-3402

NAME OF PERSON TO CONTACT Walter Hendrix

QUANTITY	DESCRIPTION OF LEASED EQUIPMENT (INCLUDE NAME AND ADDRESS OF VENDOR)
1	Caterpillar 623 Tractor, Serial No. 52 U 487
1	" 623 Scraper, " " 26 U 456
	THIS LEASE HAS BEEN ASSIGNED TO THE FIRST NATIONAL BANK OF CHICAGO, AS AGENT, AS COLLATERAL SECURITY FOR INDEBTEDNESS TO CERTAIN BANKS UNDER A REVOLVING CREDIT AND TERM LOAN AGREEMENT DATED AS OF MARCH 1, 1973.
	(Jeff Hunt Machinery Co. Charleston Highway Columbia, S.C. 29201)

PLAINTIFF'S EXHIBIT 2 EL 75-C 26

LOCATION OF EQUIPMENT
same

TERMS OF RENTAL PAYMENT

INITIAL RENTAL	INITIAL TERM	ADVANCE RENTALS	SECURITY DEPOSIT	RENEWAL RENTAL
$ 2,744.39 + tax PER MONTH FOR THE FIRST 42 MONTHS $ --- FOR THE NEXT -- MONTHS $ -- FOR THE NEXT -- MONTHS	42 MONTHS	$ 8,233.17 + tax PAYABLE ON THE SIGNING HEREOF TO BE APPLIED TO THE 1st 41st & 42nd MONTHS RENT	$ ---	$ --- PER MONTH ANNUM

TERMS AND CONDITIONS OF LEASE

NATIONAL EQUIPMENT RENTAL LTD. ("LESSOR") hereby leases to the undersigned Lessee, and Lessee hereby leases and rents from Lessor, the equipment listed above and additional lease schedules which may be executed by the parties at a later date (hereinafter collectively called "Schedule") subject to the terms and conditions set forth below and continued on the reverse side hereof.

1. TERMS AND RENTAL NOTICES: Subject to the conditions herein stated, this lease shall be for the initial term stated above commencing with delivery to Lessee, its agent or a carrier, whichever shall be earlier. Lessee agrees to pay the total rent for the initial term, which shall be in the total amount of all rental payments stated above, plus such additional rentals as are provided herein. All payments shall be made in advance at the address specified by the Lessor in its monthly invoice.

2. TITLE: Lessor shall at all times retain title to the equipment. All documents of title and evidences of delivery shall be delivered to the Lessor. Lessee will not change or remove any insignia or lettering which is on the equipment at the time of delivery or which is thereafter placed thereon indicating Lessor's ownership thereof, and at any time during the lease term, upon request of Lessor, will affix to the equipment, in a prominent place, labels, plates or other markings supplied by Lessor stating that the equipment is owned by Lessor. Lessor may at Lessee's expense cause this lease to be filed, recorded, refiled, rerecorded or financing statements (which may be signed by the Lessor only if permitted by statute) to be filed as permitted or required by law. Lessee at its expense shall protect and defend Lessor's title, at all times keeping the equipment free from any legal process and/or encumbrances whatsoever, including, but not limited to liens, attachments, levies and executions, and shall give Lessor immediate written notice thereof and shall indemnify Lessor for any loss caused by the failure of the Lessee to take action as provided herein.

3. PURCHASE, DELIVERY AND PREPAYMENTS: Lessee requests Lessor to purchase the equipment from the vendor selected by Lessee. If Lessee request Lessor to make any payments to vendor or supplier, or if Lessor makes any such payment prior to delivery and acceptance, and if Lessee for any reason does not accept the equipment, Lessee shall, on demand by Lessor, pay Lessor any amounts theretofore paid or owing by Lessor in respect to the purchase of such item of equipment and upon such payment, Lessee shall be subrogated to Lessor's claims, if any, against the manufacturer or other supplier thereof and Lessee shall become entitled to such item, as-is where-is, without warranty, express or implied, by the Lessor with respect to any matter whatsoever, and Lessee shall indemnify and save Lessor harmless from any and all liability to the supplier thereof.

4. EXECUTION; LAWS GOVERNING; SERVICE: This lease shall only be binding when accepted by the Lessor at its North New Hyde Park, N.Y. office and shall be deemed to have been made in Nassau County, New York and shall be governed by the laws of the State of New York except for local recording statutes. As part of the consideration for the Lessor's executing this lease, Lessee agrees that all actions or proceedings arising directly or indirectly from this lease shall be litigated only in courts having situs within the State of New York and the Lessee hereby consents to the jurisdiction of any local, state or federal court located within the State of New York and waives personal service of any and all process upon the Lessee herein, and consents that all such service or process shall be made by certified mail, return receipt requested, directed to the Lessee at the address hereinabove stated; and service so made shall be complete two (2) days after the same shall have been posted as aforesaid.

THE ADDITIONAL PROVISIONS ON THE REVERSE SIDE HEREOF WHICH HAVE BEEN READ BY LESSEE ARE INCLUDED IN AND MADE A PART HEREOF. LESSEE ACKNOWLEDGES RECEIPT OF A SIGNED, TRUE AND EXACT COPY OF THIS NON-CANCELABLE LEASE.

ACCEPTED, NORTH NEW HYDE PARK, N.Y.
ON June 25, 1974

NATIONAL EQUIPMENT RENTAL, LTD. Lessor

By: Herald Jacobs

DATE JUN 1 4 1974, 19

NAME OF LESSEE ~~H. WALTER HENDRIX, III~~

BY H. Walter Hendrix III
TITLE

TITLE

5. CARE AND USE OF EQUIPMENT: Lessee, at its own cost and expense, shall maintain the equipment in good operating condition, repair, and appearance, and protect same from deterioration other than normal wear and tear, shall use the equipment in the regular course of its business only within its normal capacity without abuse, and in a manner contemplated by the manufacturer thereof; shall not make modifications, alterations or additions to the equipment (other than normal operating accessories or controls), without the written consent of Lessor, which shall not be unreasonably withheld; shall not so affix the equipment to realty so as to change its nature to real property, and agrees that the equipment shall remain personal property at all times regardless of how attached or installed; shall keep the equipment on the premises where delivered, and shall not remove the equipment without the written consent of Lessor, which shall not be unreasonably withheld. All modifications, repairs, alterations, additions, replacements, substitutions, operating accessories and controls shall accrue to the equipment and become the property of the Lessor. Lessor shall have this right, during normal hours, to enter upon the premises where the equipment is located in order to inspect, observe or remove same, or otherwise protect Lessor's interest, and Lessee shall cooperate in affording Lessor the opportunity to do same. For the purpose of assuring Lessor that Lessor's equipment will be properly serviced, Lessee agrees to cause the equipment to be maintained pursuant to the manufacturer's standard preventive maintenance contract and/or recommendations. Lessee agrees that Lessor shall not be responsible for any loss or damage caused by error in programming or instructions to the leased equipment, nor shall Lessor be responsible for latent defects, wear and tear or gradual deterioration or loss of service or use of the leased equipment or any part thereof. Lessor shall not be liable to Lessee or anyone else for any liability, claim, loss, damage or expense of any kind or nature caused directly or indirectly by the inadequacy of the equipment, or any item supplied by the vendor or any other party, any interruption of use or loss of service or use or performance of any equipment, any loss of business or other consequence or damage, whether or not resulting from any of the foregoing.

6. NET LEASE: Lessee intends the rental payments in this lease to be net to the Lessor. Lessee shall comply with all laws and shall pay all taxes, including but not limited to sales and use taxes, excise taxes, personal property taxes and assessments, licenses, registrations fees, freight and transportation charges and any similar charges imposed on the ownership, possession, or use of the equipment during the term of this lease. Lessee shall pay to Lessor all costs and expenses including attorney's fees as hereinafter defined, storage, caretaking and repossession expenses in connection with the enforcement of Lessor's rights under this lease. In case any charges, costs, taxes or expenses required to be paid by the Lessee under this lease shall remain unpaid after the due date thereof, Lessor shall have the right but shall not be obligated to pay the same and to charge such payments with interest at the highest legal rate from the date of said payment, as additional rent, to be paid with the next rental payment. The rental set forth herein is based on the prime rate as of the date hereof. Lessee agrees that if there is an increase in the prime rate during the term hereof, the rental shall be increased in accordance therewith.

7. INDEMNITY: Lessee shall and does hereby indemnify and save Lessor harmless from any and all liability arising out of the ownership, selection, possession, leasing, renting, operation, control, use, maintenance, delivery and/or return of the equipment, including but not limited to, injuries causing personal injury, property damage and/or death but shall be credited with any amounts received by the Lessor with respect thereto from liability insurance secured by Lessee. That said indemnification shall include all costs and expenses including attorney's fees incurred by Lessor in connection with any suits or actions resulting from any such liability.

8. INSURANCE: Lessee shall keep equipment insured against all risks of loss or damage from every cause whatsoever for not less than the aggregate amount of unpaid total rent for the balance of the term of this lease, plus the residual value and shall carry public liability insurance, both personal injury in the amount of $100,000/$300,000 and property damage, in the amount of $25,000 covering equipment. All said insurance shall be in form and amount and with companies satisfactory to Lessor. All insurance for loss or damage shall provide that Lessor shall be the loss payee and that losses, if any, shall be payable to Lessor, and all such liability insurance shall be in the joint names of Lessor and Lessee. Lessee shall pay the premiums therefor and deliver to Lessor the policies of insurance or duplicates thereof, or other evidence satisfactory to Lessor of such insurance coverage. Each insurer shall agree, by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor, that it will give Lessor 30 days prior written notice of the effective date of any alteration or cancellation of such policy. The proceeds of such insurance, payable as a result of loss or of damage to equipment, shall be applied at the option of Lessor, (a) toward the replacement, restoration or repair of equipment which may be lost, stolen, destroyed or damaged or (b) toward payment of the obligations of Lessee hereunder. Lessee hereby irrevocably appoints Lessor as Lessee's attorney-in-fact to make claim for, receive payment of and execute and endorse all documents, checks or drafts received in payment for loss or damage under any said insurance policy. In case of the failure of Lessee to procure or maintain said insurance to comply with any other provision of this lease, Lessor shall have the right but shall not be obligated, to effect such insurance or compliance on behalf of Lessee. In that event, all monies spent by, and expenses of, Lessor in effecting such insurance or compliance shall be deemed to be additional rent, and shall be paid by Lessee with interest at highest legal rate to Lessor with the next monthly payment of rent.

9. DEFAULT: **If (a) Lessee shall default in the payment of any rent or in making any other payment hereunder when due, or (b) Lessee shall default in the payment when due of any indebtedness of Lessee to Lessor arising independently of this lease, or (c) Lessee shall breach any warranty hereunder, or (d) Lessee shall default in the performance of any other covenant herein and such default continues for 10 days after written notice thereof to Lessee by Lessor, or (e) Lessee becomes insolvent or makes an assignment for the benefit of creditors, or (f) Lessee applies for, or consents to, the appointment of a receiver, trustee, conservator or liquidator of Lessee or of all or a substantial part of the assets of Lessee, or if such receiver, trustee, conservator or liquidator is appointed without the application or consent of Lessee, or (g) petition is filed by or against Lessee under the Bankruptcy Act or any amendment thereto (including, without limitation, a petition for reorganization, arrangement or extension) or under any other insolvency law or law providing for the relief of debtors, then, if and to the extent permitted by applicable law, Lessor shall have the right to exercise any one or more of the remedies as provided hereafter.**

REMEDIES: In the event of default, Lessor may at its option, (a) declare the entire amount of the unpaid rental for the full balance of the term of the lease due and payable immediately without further notice, whereupon the same shall become immediately due and payable, (b) without demand or legal process and without being guilty of trespass or conversion and without thereby rendering the Lessor liable to refund any sums received as a deposit or as prepaid rent and without constituting a termination of the lease or relieving the Lessee of its original obligation, enter into the premises where the equipment may be found and take possession of same and remove same, whereupon all rights of Lessee in such equipment shall terminate absolutely and (c) retain all prior payments of rent and sell the same at public or private sale with or without notice to Lessee, with or without having the equipment at the sale, at which sale Lessor may purchase all or any part of the equipment or relet the equipment for a longer or shorter term than the original lease, the proceeds of such sale or reletting, less the expenses of retaking, storage, repairing, reselling or reletting and attorney's fees as hereinafter defined, to be applied to the payment of the unpaid total rent for the balance of the term of this lease. Lessee shall remain liable for the balance of the unpaid rent. Lessee shall be liable for all expenses Lessor may incur in connection with the enforcement of any of its remedies herein, including without limitation attorney's fees equal to 20% of the total unpaid balance or in any action to recover possession of Lessor's property, 20% of the value of said property.

All remedies of Lessor hereunder are cumulative and may, to the extent permitted by the law, be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed to be an election of such remedy or to preclude the exercise of any other remedy. No failure on the part of the Lessor to exercise, and no delay in exercising any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by Lessor of any right or remedy hereunder preclude any other or further exercise of any other right or remedy. Whenever any payment is not made when due hereinunder, the Lessee promises to pay to the Lessor or its assigns, not later than one month thereafter, an amount calculated at the rate of 12% per annum for such delayed payment and to make such payments as liquidated damages occasioned by such delay.

10. RISK OF LOSS: Lessee hereby assumes the entire risk of loss, from any and every cause whatsoever. In event of loss, Lessee at its expense and at Lessor's option shall either (a) repair the equipment, returning it to its previous condition, or (b) replace same with like equipment acceptable to Lessor and in good condition and equivalent value, which shall become the property of the Lessor, or (c) pay Lessor all unpaid rents or such unpaid rents as may be allocated to specific items of equipment. Upon replacement or payment, this lease shall terminate with respect to replaced or paid for equipment and Lessee shall take title to same on an as-is where-is basis. In case Lessee shall fail to repair, replace or pay for same, Lessor may repair at Lessee's expense, to be charged as additional rental.

11. OTHER COVENANTS: **Lessee agrees that its obligations under this lease are absolute, and shall continue in force and effect regardless of the disability of the Lessee to use the equipment because of any reason whatsoever, including but not limited to, wear, act of God, government regulations, strike, loss or damage, obsolescence; breach of contract or warranty; failure of, or delay in, delivery, misdelivery and that its obligations shall not abate due to any claim or set-off against Lessor. Lessee warrants that the application, statements and financial reports submitted by it to the Lessor are material inducements to the granting of this lease and that any material misrepresentations shall constitute default hereunder. Lessee agrees that Lessor has made no warranties or representations, express or implied, including the warranty of merchantability, with regard to the equipment and that the equipment has been selected by the Lessee and is of a design, size, fitness and capacity selected by the Lessee and that the Lessee is satisfied that the same is suitable and fit for its purposes.** Lessee agrees to procure for Lessor such estoppel certificates, landlord's and/or mortgagee's waivers or any other documents as Lessor or its assigns may reasonably request to effectuate the purposes of this lease. Lessee agrees to furnish its certified annual financial statements or any other information delivered by it to its banks, stockholders or other creditors and such other financial statements as the Lessor may require. Lessee agrees not to sublet or otherwise assign or transfer its rights and obligations hereunder without the written consent of Lessor, which consent shall not be unreasonably withheld, provided however that any consent to such assignment or transfer shall not release the Lessee from any liability hereunder. Lessee warrants that this lease has been duly authorized, that no provision of this lease is inconsistent with Lessee's charter or by-laws or any loan or credit agreement or other instrument to which Lessee is a party or by which by Lessor or its property may be bound or affected. Lessee agrees that the Lessor may examine Lessee's books and financial records on due notice. **Lessee hereby waives a trial by jury and the right to interpose any counterclaim or offset of any nature or description in any litigation between the Lessee and Lessor with respect to this lease, the property covered hereunder and the repossession hereof.**

12. ASSIGNMENT: This lease or any equipment or any rents or other sums to become due hereunder may be transferred or assigned by Lessor without notice and in such event, Lessor's transferee or assignee shall have all rights, powers, privileges and remedies of Lessor hereunder and Lessee's obligations hereunder shall not be subject to any defense, offset or counterclaim available to Lessee against Lessor. This lease is subject and subordinate to any mortgage which now or hereafter may affect the leased equipment, except that so long as the Lessee is not in default hereunder, the Lessee shall be entitled to peacefully and quietly hold, enjoy, possess and use such equipment during the term specified herein.

13. REDELIVERY: At the expiration of this lease, Lessee shall at its expense deliver equipment to the Lessor at an address specified by Lessor within the continental United States and in the same condition as received, less normal depreciation and wear.

14. SECURITY DEPOSIT: The Lessor acknowledges receipt of the sum set forth above as a returnable deposit from the Lessee to secure the faithful performance by the Lessee of all obligations of the Lessee under the lease. The parties agree that at any time the Lessee is in default, Lessor may apply all or any part of said deposit to the payment of rentals due hereunder and should the Lessee fail to return any or all the equipment leased hereunder, the Lessor at its option, may elect to retain said deposit as liquidated damages.

15. ADDITIONAL SCHEDULES; AMENDMENTS: This lease and all other leases and schedules added hereto as designated by the lease number above shall be construed as one lease and a default on one lease shall be deemed a default on all leases between the parties. Except as provided herein, this lease contains the entire agreement between the parties, and may not be altered, modified, terminated or discharged except in writing. Where a noun form is used herein is inappropriate, the singular or plural form, whichever is appropriate, shall be deemed substituted therefor.

16. RENEWAL RENTALS: Lessee shall have the option, if Lessee is not in default hereunder, upon giving written notice to Lessor at least 30 days prior to the termination of the original or any renewal term of this lease to renew this lease for such term and at such rental as is specified in the schedule, payable in advance at the beginning of each such term.

RIDER TO LEASE AGREEMENT BETWEEN
H. WALTER HENDRIX III AS LESSEE
AND NATIONAL EQUIPMENT RENTAL LTD.
DATED: June 11, 1974 LEASE NO. 50-205 B

1. Notwithstanding the provisions of the lease agreement, Lessee will, during the term hereof, at its sole cost and expense, keep each vehicle described in Schedule A, insured against loss by fire and theft and liability for personal injuries and property loss or damage sustained by others resulting from the operation, use or possession of any leased property described in said Schedule A. The Lessee will, during the term of this lease, at its sole cost and expense keep each vehicle described in Schedule A, insured against, by collision insurance of ~~$500.00~~ $250.00 deductible and the Lessee, should a collision occur, shall also be liable for the $50.00 deductible not covered by the insurance policy which shall be paid on the next ensuing monthly rental installment due.

2. a) Said policies shall be in favor of the Lessor and/or Assignee of the Lessor and the Lessee as their rights may appear and shall be with companies satisfactory to Lessor. Policies relating to the property damage and bodily injury shall provide minimum coverage of ~~$500,000~~ $100,000 insurance for injury or death to one person and a total liability of ~~$1,000,000~~ $300,000 for all persons injured or killed in the same accident, and Lessor shall be named as additional insured, and a minimum coverage of ~~$50,000~~ $100,000 insurance for damage, destruction and/or loss of use of property of third persons arising out of one accident.

b) At, or prior to the delivery of the leased property, or at any renewal or extension hereof, Lessee shall deliver to Lessor a proper certificate of insurance which shall show coverage on each item of the leased property and the interest of the Lessor and/or its Assignee. Also a copy of the insurance policy.

3. Lessee agrees that: It

a) At its own cost and expense, maintain each vehicle in mechanical condition adequate to comply with the laws of the State in which said vehicle is operated.

b) Shall furnish at its own cost and expense, all fuels, oils and lubricants necessary for the operation of the subject motor vehicle and to keep painting and lettering on such vehicles in good condition so that they will present a neat appearance at all times.

c) At its own cost and expense, furnish a garage or a suitable storage space for each of the motor vehicles hereby leased and to provide Lessor with the name and address of garage used for such purpose.

d) Will operate all vehicles leased to the Lessee under this lease only by safe, careful licensed drivers to be selected, employed, controlled and paid by the Lessee. Said drivers being conclusively presumed to be the agents of the Lessee only and the Lessee shall require said drivers to operate all such vehicles with reasonable care and diligence and to use every reasonable precaution to prevent loss or damage to any of said vehicles because of fire, theft or collision and to prevent injury to third persons or property of third persons and upon written complaint from the Lessor specifying [illegible]y wreckless, careless or abusive handling of any vehicles leased hereunder the Lessee shall remove the drivers, or driver, and substitute individual careful and safe drivers as soon as it is reasonably possible to do so.

e) Shall cause it's drivers, servants and agents to cooperate fully with the Lessor and insurance companies insuring the

hazards hereunder, in the investigation and defense of any and all claims or suits arising from the operation of the vehicles leased hereunder and the Lessor will cause it's drivers, agents and servants to make prompt written report to the Lessor for the occurrence of any and all accidents or collisions which occur while the vehicles leased hereunder are in the custody and control of the Lessee or it's drivers, agents or servants, with the fullest information available regarding the time, place and nature of the accident, or damage, together with a list of persons injured and owners of property damaged and a complete list of witnesses as it is possible to secure.

f) Will not overload any vehicle operating under the terms of this lease beyond the gross vehicle weight for that vehicle recommended by the manufacturer.

g) The vehicles operating under this lease shall be used only and exclusively in the usual course of the Lessee's business.

h) Will not permit the motor vehicles leased hereunder to be used in violation of any Federal, State and Municipal law, ordinance, rule or regulation applicable to the operation of such motor vehicles and will indemnify and hold the Lessor harmless from any and/or all fines, forfeitures or penalties for any traffic violation of any statute, law, ordinance, rule or regulation of any duly constituted public authority. The Lessee shall be liable to the Lessor for the loss of any said motor vehicles caused by the confiscation thereof by any public authority by reason of illegal use thereof by the Lessee, it's agents, servants or employees which, upon such confiscation, all rentals remaining due hereunder for any vehicle confiscated shall become immediately

due and payable.

i) Shall pay the cost of license plates, registrations and recording fees including fees for the proper recording or filing of this lease or any assignment thereof and any chattel mortgages or other lien that the Lessor may give as protection to any Assignee of Lessor. Such payments shall be made at the time of license, registration and/or recording.

SIGN HERE → By H. Walter Hawkins III

National Equipment Rental, Ltd.

By Gerald Sprecols, Secy

PLAINTIFF'S EXHIBIT 3 - OPTION DATED APRIL 13, 1974

OPTION

This agreement between NATIONAL EQUIPMENT RENTAL, LTD. (Lessor), a Delaware corporation, having a place of business at 410 Lakeville Road, Lake Success, N.Y., and H. Walter Hendrix, III

having its principal place of business at Route 1, Box 207, Lexington, S.C. 29072

(Lessee)

Whereas, Lessor has leased to Lessee equipment under lease agreement, no. 50-205 schedule A ; and

Whereas, Lessee desires an option to purchase the said equipment from Lessor at the expiration of said lease agreement and/or schedule;

Now, therefor: in consideration of One Dollar ($1.00) lawful money of the United States and other good and valuable considerations paid to the Lessor by the Lessee, the receipt of which is hereby acknowledged, it is mutually agreed as follows:

Lessor hereby grants to the Lessee, an irrevocable option to purchase:

One (1) InternationalModel TD-15 Series C, Power Shift Crawler Tractor
Serial No. 1390

rented by the Lessee from the Lessor, provided that the Lessee shall notify Lessor in writing at least thirty (30) days prior to the expiration of the lease and or schedule of its intention to exercise said option with respect to the equipment so leased and upon the further condition that the Lessee has made timely payments of monthly rentals and has fully performed and complied with all the terms of the aforementioned lease agreement and/or schedule on its part to be performed.

The price to be paid by the Lessee to Lessor shall be three thousand one hundred sixteen and 16/100 dollars ($3,116.16)

It is mutually understood and agreed that the said lease between the parties hereto is not and shall not be construed as an installment purchase contract or a conditional sale; but this agreement is a separate and distinct agreement between the parties hereto.

In witness whereof the parties hereto have set their hand and seal this thirtieth day of April 19 74

NATIONAL EQUIPMENT RENTAL, LTD.

Gerald Gambino

Title

H. WALTER HENDRIX III

SIGN HERE H. Walter Hendrix III

Title

PLAINTIFF'S EXHIBIT 3 EL DSC 26

Form Op 3-Rev.-3/73

PLAINTIFF'S EXHIBIT 4 - PURCHASE AGREEMENT DATED JUNE 11, 1974

PURCHASE AGREEMENT

THIS AGREEMENT between National Equipment Rental, Ltd., a Delaware Corporation having a place of business at 410 Lakeville Rd., Lake Success, N.Y. 11040 ("Lessor") and H. Walter Hendrix, III Route 1, Box 207, Lexington, S.C. 29072 having a place of business at ("Lessee").

WHEREAS, Lessor has leased to Lessee a certain equipment pursuant to a lease agreement dated having number 50-205B and

WHEREAS, the parties hereto are desirous of providing for the disposition of the equipment at the expiration of the lease term;

NOW, THEREFORE, in consideration of $10.00 and other good and valuable consideration paid to Lessor by Lessee, the receipt of which is hereby acknowledged, it is agreed as follows:

1. Lessor hereby grants to Lessee an irrevocable option to purchase the said equipment for the sum of eight thousand four hundred forty four & 27/100 ($8,444.27) plus applicable taxes at the expiration of the lease term, provided that Lessee shall notify Lessor in writing of its intention to exercise said option and upon further condition that Lessee has fully performed and complied with all the terms of the lease on their part to be performed.

2. Should Lessee not exercise its option, the Lessor may at its sole option, require Lesse to purchase said equipment at the end of the lease term for the sum of eight thousand four hundred forty four & 27/100, ($8,444.27) plus applicable taxes.

3. Should either party exercise its option hereunder, then title to the equipment shall transfer to Lessee upon payment to Lessor by cash or certified check of the option price.

4. It is mutually understood and agreed that the said lease between the parties is not and shall not be construed as an installment purchase contract or a conditional sales contract, but this option agreement is a separate and distinct agreement between the parties hereto.

IN WITNESS WHEREOF, the parties have executed this agreement this 11th day of June, 1974

NATIONAL EQUIPMENT RENTAL, LTD.

By Gerald Spaces

H. WALTER HENDRIX, III

SIGN HERE → By H. Walter Hendrix III Lessee

PLAINTIFF'S EXHIBIT 4 EL 75 C 26

PLAINTIFF'S EXHIBIT 5 - GUARANTEE OF PAYMENT
DATED APRIL 30, 1974

GUARANTEE OF PAYMENT

In consideration of National Equipment Rental, Ltd., ("Lessor") executing and entering into a Lease or other obligation with

H. WALTER HENDRIX, III
Lessee

Route 1, Box 207, Lexington, S.C. 29072
Address

the undersigned, (if more than one, then jointly and severally) hereby irrevocably and unconditionally guarantee payment when due, whether by acceleration or otherwise, of the Lease, any and all schedules or leases now or hereafter entered into with Lessee and all the obligations and liabilities due and to become due to Lessor from Lessee, under any Lease, Note or other obligation of Lessee to Lessor, together with all interest thereon and all attorney's fees, costs and expenses of collection inocurred by the Lessor in enforcing any such obligations and liabilities.

The undersigned acknowledges notice of the intended assignment of the aforesaid Lease and hereby consents to such assignment and specifically agrees that this Guarantee is and shall be an open and continuing Guarantee and all obligations and liabilities to which it applies or may apply under the terms hereof shall be conclusively presumed to have been created in reliance hereon and shall continue in full force and effect, notwithstanding any (a) change in rentals or other obligations under said Lease, (b) renewals, modifications, additions or extensions thereto extensions of time to perform any of the obligations thereunder; and waives notice of the assignment by NATIONAL EQUIPMENT RENTAL, LTD., and waives notice of any such changes, renewals, modifications, additions, extensions or of any default by the Lessee thereunder. The undersigned further agrees and consents to any assignment of this Guarantee, in which event it shall enure to the benefit of any such assignee with the same force and effect as though the said assignee was specifically named herein and hereby waives any notice of any of such assignment.

No invalidity, irregularity or unenforceability of all or any part of the obligations and liabilities hereby Guaranteed or of any security therefor shall affect, impair or be a defense to this Guarantee, and this Guarantee is a primary obligation of the undersigned.

This instrument shall be deemed to have been made in Nassau County, New York, and shall be interpreted in accordance with the laws of the State of New York, and as part of the consideration for the Lessor's execution of the aforementioned Lease, the undersigned Guarantor hereby agrees that any and all actions or proceedings arising directly or indirectly from this Guarantee shall be litigated in courts having a situs within the State of New York, and the undersigned Guarantor hereby consents to the jurisidiction of any local, State or Federal Court located within the State of New York, and the undersigned Guarantor hereby waives personal service of any and all process, and consents that all such service of process may be made by certified or registered mail, return receipt requested, directed to the undersigned Guarantor at the address indicated below; and service so made shall be complete two (2) days after the same has been posted as aforesaid.

This Guarantee shall bind the respective heirs, executors, administrators, successors and assigns of the undersigned

Dated: the thirtieth day of April, 19 74

SIGN HERE Jean K. Hendrix — Rt. 1 Lexington, S.C. — 803-356-3402 phone

(Name) Jean Hendrix (Address)

(Name) (Address)

(Name) (Address)

* If Corporation (Affix) (Corp. Seal) Corporation .....

By: ..... (Title) (Address)

I, ..., certify that I am the (assistant) secretary of ....., a ..... corporation; that a ..... meeting of the Board of Directors (or) (..... Committee, so authorized by the by-laws) held on the ..... day of ..... 19 ....., foregoing guarantee in the terms thereof was regularly introduced and passed, appears of record in the minute books, and is in full force and effect.

WITNESS OUR HANDS AND SEALS THIS _____ DAY OF _____, 19 _____

Attest: (Assistant) Secretary

PLAINTIFF'S EXHIBIT 5 EV 75C26

STATE OF South Carolina
COUNTY OF Lexington } ss.

On the 30th day of April, 1974, before me personally came Jean K. Hendrix to me known, who being by me duly sworn, did depose and say that she resides at Rt. 1, Lexington, S.C. that she is the person described in and who executed the foregoing instrument and he acknowledged to me that she executed the same.

L. Rich[illegible]
Notary

2M 2-74 WAT.

PLAINTIFF'S EXHIBIT 6 - LETTER FROM TIGER LEASING GROUP TO DEFENDANTS DATED DECEMBER 5, 1974

A17

TIGER LEASING GROUP

Certified - R.R.R.

Air Mail

December 5, 1974

H. Walter Hendricks, III
Route 1, Box 207
Lexington, S. C. 29072

Mrs. Jean K. Hendricks
Route 1, Box 207
Lexington, S. C. 29072

Re: Lease No. 50205

Dear Sir and Madam:

In accordance with our lease agreement, we will sell at a private sale to be held at 10:30 A.M. on the 16th day of December, 1974, the following equipment.

1. International Model TD-15 Series C., Power Shift Crawler Tractor, Serial No. 1390
2. Caterpillar 623 Tractor, Serial No. 52 U 487
3. Caterpillar 623 Scraper, Serial No. 26 U 456.

The sale will be held at the premises of Jeff Hunt Machinery Co., Charleston Highway, Columbia, S.C. Your balance due is $143,269.87.

Please be advised that in the event that the net return after deducting expenses and costs, is insufficient to cover the balance due National Equipment Rental, Ltd., under the lease agreement, we shall be required to institute suit for the unpaid balance due.

Very truly yours,

Gerald S. Jacobs

Gerald S. Jacobs,
Secretary & General Counsel

GSJ:ra

PLAINTIFF'S EXHIBIT 6, EL 75-026

GERALD S. JACOBS
SECRETARY & GENERAL COUNSEL

NATIONAL EQUIPMENT RENTAL, LTD.
410 LAKEVILLE ROAD • LAKE SUCCESS, NEW YORK 11040 • (212) 343-1000 • TELEX 12085

PLAINTIFF'S EXHIBIT 7 - MEMO FROM JOE G. WHITEHURST TO WALTER HENDRIK DATED NOVEMBER 15, 1974

TO: WALTER HENDRIK
FROM: JOE G. WHITEHURST

IN AGREEMENT FOR RELINQUISHING THE USE OF (1) CATERPILLAR 623 ELEVATING SCRAPER S/N 5ZU487 AND (1) INTERNATIONAL HARVESTER TD-15 TRACTOR S/N 1390. I AGREE THAT ANY TIME BEFORE DECEMBER 2, 1974, WALTER HENDRIK MAY RECLAIM THE ABOVE EQUIPMENT BY PAYING ANY AND ALL BACK LEASE PAYMENTS, LATE CHARGES AND INSUFFICENT CHECKS PREVIOUSLY GIVEN TO NATIONAL EQUIPMENT RENTAL, LTD.

Joe G. Whitehurst
15 NOV. 1974

RECEIVED NOV 25 1975 N.E.R.L.S.

PLAINTIFF'S EXHIBIT 7 EL 75C26

PLAINTIFF'S EXHIBIT 11 - PURCHASE ORDER DATED MAY 14, 1974

NATIONAL EQUIPMENT RENTAL LTD.

P. O. Box 3473 No. New Hyde Park, N. Y. 11040
(212) 343-1000

A MEMBER OF THE FLYING TIGER GROUP

Purchase Order No. 06260

Lease No. 50-205 A

PLAINTIFF'S EXHIBIT 11 EL 75 C 26

NAME AND ADDRESS OF VENDOR

Western Carolina Tractor Co.
P.O. Box 9068
Columbia, S.C. 29290

NAME AND ADDRESS

H. Walter Hendrix, III
Route 1
Box 207
Lexington, S.C. 29072

QUANTITY	EQUIPMENT LEASED	PRICE
1	INTERNATIONAL MODEL TD-15 Series C, Power Shift Crawler Tractor Serial No. 1390	$31,161.62
	as per invoice #Co-95489	
	CONFIRMATION - DO NOT DUPLICATE	
SHIP TO LESSEE AT: Same	TOTAL COST	$ 31,161.62

Call today

PURCHASE ORDER

CONDITIONS:

1. Invoice in triplicate must be mailed on date of shipment to NATIONAL EQUIPMENT RENTAL, LTD, (NATIONAL) at P. O. Box 3473, North New Hyde Park, N. Y. 11040. All invoices must refer to the purchase order number shown above.
2. This order is given in reliance on your assurance that LESSEE has selected the EQUIPMENT described above and will accept the same on delivery. If LESSEE does not accept the EQUIPMENT for cause, LESSEE shall return same and we shall have no obligation hereunder, and you shall refund to us all sums paid for or on account of the EQUIPMENT.
3. Title to the EQUIPMENT shall pass from you directly to us and shall be free of all liens and encumbrances. You warrant that the EQUIPMENT will comply with all warranties, agreements and representations made by you to LESSEE, "By your acceptance of this order and invoice to us, you agree that you will make available to LESSEE and will permit LESSEE to enforce against you your standard representations, warranties and service obligations in the same manner as if LESSEE were the purchaser of the EQUIPMENT."
4. You shall deliver the EQUIPMENT to LESSEE at the address indicated above.
5. Terms of payment: Ten (10) days after Purchase Order date but in no event prior to receipt of equipment as set forth in paragraph 6 hereof.
6. Acceptance Notice (Receipt of Equipment) must be signed by LESSEE and received by NATIONAL before invoice payment will be made to vendor.
7. Unless otherwise specified above, if the EQUIPMENT is not delivered installed and accepted by the LESSEE within 90 days of the date hereof, NATIONAL may cancel this purchase order without penalty or charge whatsoever by mailing written notice thereof to Vendor.

mad:JS (Charlotte)
PLEASE NOTE CONDITION NO. 6

DATED May 14, 1974

RESALE NO. 51-87348

NATIONAL EQUIPMENT RENTAL LTD

BY

TITLE

PURCHASE ORDER - 4

PLAINTIFF'S EXHIBIT 12 - PURCHASE ORDER DATED JUNE 26, 1974

NATIONAL EQUIPMENT RENTAL LTD.

P. O. Box 3473 No. New Hyde Park, N. Y. 11040
(212) 343-1000

A MEMBER OF THE FLYING TIGER GROUP

Purchase Order No. 06562

Lease No. 50-

PLAINTIFF'S EXHIBIT 12 EL 75 C 26

NAME AND ADDRESS OF VENDOR

JEFF HUNT MACHINERY CO.
P.O. Box 328
Columbia, South Carolina 29202
803-794-1454
794-1451
Leon Williams
Gen. Manager

NAME AND ADDRESS OF

H. WALTER HENDRIX, III
Route 1
Box 207
Lexington, S.C. 29072

Gen. Off.

12/4/73 Rec'd by Vendor

QUANTITY	EQUIPMENT LEASED	PRICE
		$84,442.74
1	Caterpillar 623 Tractor, C-H, Arrgt. 8D7300, S/N 52U487 with accessories	
1	Caterpillar 623 Scraper, Arrgt 8J3929, S/N 26U456 with accessories	
	As per invoice # 40688	

CONFIRMATION-DO NOT DUPLICATE

SHIP TO LESSEE AT: same

TOTAL COST $ 84,442.74

07/14/74

PURCHASE ORDER

CONDITIONS:

1. Invoice in triplicate must be mailed on date of shipment to NATIONAL EQUIPMENT RENTAL, LTD, (NATIONAL) at P. O. Box 3473, North New Hyde Park, N. Y. 11040. All invoices must refer to the purchase order number shown above.
2. This order is given in reliance on your assurance that LESSEE has selected the EQUIPMENT described above and will accept the same on delivery. If LESSEE does not accept the EQUIPMENT for cause, LESSEE shall return same and we shall have no obligation hereunder, and you shall refund to us all sums paid for or on account of the EQUIPMENT.
3. Title to the EQUIPMENT shall pass from you directly to us and shall be free of all liens and encumbrances. You warrant that the EQUIPMENT will comply with all warranties, agreements and representations made by you to LESSEE, "By your acceptance of this order and invoice to us, you agree that you will make available to LESSEE and will permit LESSEE to enforce against you your standard representations, warranties and service obligations in the same manner as if LESSEE were the purchaser of the EQUIPMENT."
4. You shall deliver the EQUIPMENT to LESSEE at the address indicated above.
5. Terms of payment: Ten (10) days after Purchase Order date but in no event prior to receipt of equipment as set forth in paragraph 6 hereof.
6. Acceptance Notice (Receipt of Equipment) must be signed by LESSEE and received by NATIONAL before invoice payment will be made to vendor.
7. Unless otherwise specified above, if the EQUIPMENT is not delivered installed and accepted by the LESSEE within 90 days of the date hereof, NATIONAL may cancel this purchase order without penalty or charge whatsoever by mailing written notice thereof to Vendor.

JS:CHARLOTTE mh

PLEASE NOTE CONDITION NO. 6

DATED June 26, 19 74

RESALE NO. S.C. 51 87348

NATIONAL EQUIPMENT RENTAL LTD.

BY

TITLE

PURCHASE ORDER - 4

PLAINTIFF'S EXHIBIT 13 - LETTER FROM H. WALTER HENDRIX, III TO PLAINTIFF DATED APRIL 1974

PLAINTIFF'S EXHIBIT 13 75-C-26

April 1974

NATIONAL EQUIPMENT RENTAL LTD.
410 Lakeville Road
Lake Success, New York 11040

Attention: Mr. Gerald Jacobs

In re: Lease No. 50-205 A

Gentlemen:

This is to authorize you to pay the vendor's invoice for equipment on subject lease.

This may be paid in full, $31,161.62.

Very truly yours,

H. WALTER HENDRIX, III

By H. Walter Hendrix, III

PLAINTIFF'S EXHIBIT 13-A - LETTER FROM H. WALTER HENDRIX, III TO PLAINTIFF DATED JUNE 11, 1974

PLAINTIFF'S EXHIBIT 13-A

June 11, 1974

NATIONAL EQUIPMENT RENTAL, LTD.
410 Lakeville Road
Lake Success, New York 11040

In re: LEASE # 50-205 B

Gentlemen:

This is to acknowledge that I have accepted delivery of the Caterpillar Tractor (serial no. 52 U 487) and Caterpillar Scraper (serial no. 26 U 456) from Jeff Hunt Machinery and hereby authorize you to pay them in full for the equipment, $84,442.74.

Very truly yours,

H. Walter Hendrix, III

H. Walter Hendrix, III

PLAINTIFF'S EXHIBIT 14 - LEASE APPLICATION DATED APRIL 30, 1974

NATIONAL EQUIPMENT RENTAL LTD. (LESSOR)
P.O. BOX 3473 NORTH NEW HYDE PARK, N. Y. 11040 (212) 343-1000
A MEMBER OF THE FLYING TIGER GROUP

LEASE NUMBER 50x3 50-205
SCHEDULE A

NAME AND ADDRESS OF LESSEE

H. WALTER HENDRIX, III
Route 1
Box 207
Lexington, S.C. 29072

(CHECK ONE) ☐ CORPORATION ☐ PARTNERSHIP ☒ PROPRIETORSHIP TELEPHONE NO. 803-356-3402
NAME OF PERSON TO CONTACT H. Walter Hendrix, III

QUANTITY	DESCRIPTION OF LEASED EQUIPMENT (INCLUDE NAME AND ADDRESS OF VENDOR)	COST
1	International Model TD-15 Series C, Power Shift Crawler Tractor Serial No. 1390 (Western Carolina Tractor Co. P.O. Box 9068 Columbia, S.C. 29290)	$31,161.62

PLAINTIFF'S EXHIBIT 14 EL

LOCATION OF EQUIPMENT: same

TOTAL COST $ 31,161.62

TERMS OF RENTAL PAYMENT

INITIAL RENTAL	INITIAL TERM	ADVANCE RENTALS	SECURITY DEPOSIT	RENEWAL RENTAL
56.29 + tax PER MONTH FOR FIRST 49 MONTHS $ --- THE NEXT --- MONTHS --- FOR THE NEXT -- MONTHS	49 MONTHS	$1,732.58 +tax PAYABLE ON THE SIGNING HEREOF TO BE APPLIED TO THE 1st & 49th MONTHS RENT	$ --	$ ---- PER MONTH ANNUM

NAMES, RESIDENCE ADDRESSES TELEPHONE NUMBERS OF INDIVIDUAL, PARTNERS OR PRINCIPAL'S. (IF INDIVIDUAL OR PARTNERS, SHOW WIFE'S NAME)

BANK NAME / ADDRESS / OFFICER
Lexington State Bank, Lexington, S.C. 803-359-5111 (Lucille Powell)

BANK NAME / ADDRESS / OFFICER
American Bank & Trust, 919 Bluff Rd., Columbia, S.C. 803-779-6680 (Harry Autley)

TRADE REFERENCES (LIST THREE) / ADDRESS / TELEPHONE NUMBER
& J Leasing, 215 E. Warren, Shelby, N.C. (Gene Harmon) 704-487-9001

ATTACHED IS LATEST AUDITED FISCAL BALANCE SHEET AND PROFIT AND LOSS STATEMENTS WITH SUPPORTING NOTES AND SCHEDULES FOR YEAR ENDING _____

THE UNDERSIGNED REQUESTS LESSOR TO PURCHASE EQUIPMENT OF THE TYPE AND QUANTITY SPECIFIED ABOVE FROM THE VENDOR SPECIFIED ABOVE, AND AGREES, UPON WRITTEN ACCEPTANCE OF THE LEASE BY AN AUTHORIZED OFFICER OF THE LESSOR, TO LEASE SAID EQUIPMENT FROM LESSOR ON THE TERMS AND CONDITIONS OF THE LEASE ATTACHED HERETO. THE UNDERSIGNED SPECIFICALLY ACKNOWLEDGES THAT THE VENDOR, HIS EMPLOYEES OR REPRESENTATIVES ARE NOT AGENTS OF, NOR ACTING ON BEHALF OF LESSOR. THE UNDERSIGNED AUTHORIZES LESSOR TO INVESTIGATE ITS CREDIT.

H. Walter Hendrix, III
LESSEE

SIGNATURE BY H. Walter Hendrix, III

APR 30 1974

TITLE

PLAINTIFF'S EXHIBIT 14-A - LEASE APPLICATION DATED JUNE 11, 1974

NATIONAL EQUIPMENT RENTAL LTD. (LESSOR)
P.O. BOX 3473 NORTH NEW HYDE PARK, N. Y. 11040 (212) 343-1000
A MEMBER OF THE FLYING TIGER GROUP

50-205
LEASE NUMBER
B
SCHEDULE

NAME AND ADDRESS OF LESSEE

H. WALTER HENDRIX, III
Route 1
Box 207
Lexington, S.C. 29072

(CHECK ONE) [X] CORPORATION [ ] PARTNERSHIP [ ] PROPRIETORSHIP TELEPHONE NO. 803-356-3402
NAME OF PERSON TO CONTACT Walter Hendrix

QUANTITY	DESCRIPTION OF LEASED EQUIPMENT (INCLUDE NAME AND ADDRESS OF VENDOR)	COST
		$84,442.74
1	Caterpillar 623 Tractor, Serial No. 52 U 487	
1	" 623 Scraper, " " 26 U 456	
	(Jeff Hunt Machinery Co. Charleston Highway Columbia, S.C. 29201)	
ON OF EQUIPMENT same	TOTAL COST	$ 84,442.74

PLAINTIFF'S EXHIBIT 14A EV

TERMS OF RENTAL PAYMENT

INITIAL RENTAL	INITIAL TERM	ADVANCE RENTALS	SECURITY DEPOSIT	RENEWAL RENTAL
,744.39 + tax PER MONTH FOR FIRST 42 MONTHS $--- THE NEXT -- MONTHS - FOR THE NEXT -- MONTHS	42 MONTHS	$ 8,233.17 + tax PAYABLE ON THE SIGNING HEREOF TO BE APPLIED TO THE 1st, 41st & 42nd MONTHS RENT	$ ----	$ --- PER MONTH ANNUM

NAMES, RESIDENCE ADDRESSES, TELEPHONE NUMBERS OF INDIVIDUAL, PARTNERS OR PRINCIPAL'S. (IF INDIVIDUAL OR PARTNERS, SHOW WIFE'S NAME)

K NAME ADDRESS OFFICER

K NAME ADDRESS OFFICER

E REFERENCES (LIST THREE) ADDRESS TELEPHONE NUMBER

HED IS LATEST AUDITED FISCAL BALANCE SHEET AND PROFIT AND LOSS STATEMENTS WITH SUPPORTING NOTES AND JLES FOR YEAR ENDING _____.

UNDERSIGNED REQUESTS LESSOR TO PURCHASE EQUIPMENT OF THE TYPE AND QUANTITY SPECIFIED ABOVE FROM THE VENDOR) ABOVE, AND AGREES, UPON WRITTEN ACCEPTANCE OF THE LEASE BY AN AUTHORIZED OFFICER OF THE LESSOR, TO LEASE SAID AENT FROM LESSOR ON THE TERMS AND CONDITIONS OF THE LEASE ATTACHED HERETO. THE UNDERSIGNED SPECIFICALLY S THAT THE VENDOR, HIS EMPLOYEES OR REPRESENTATIVES ARE NOT AGENTS OF, NOR ACTING ON BEHALF OF LESSOR. AUTHORIZES LESSOR TO INVESTIGATE ITS CREDIT.

H. WALTER HENDRIX, III
LESSEE

SIGN HERE BY H. Walter Hendrix III

JUN 11 1974

TITLE

DEFENDANTS' EXHIBIT A - PHONE BILL

EXPLANATION OF TYPE CODE

	ANI	ONI	OMS
CALL DIALED DIRECT FROM YOUR NUMBER	&	O	
OPERATOR HANDLED CALL OR OPERATOR HANDLED DDD CALL	A	/	1
THIRD NUMBER CALL	B	S	2
CREDIT CARD CALL	C	T	3
COLLECT CALL	D	U	4
MISCELLANEOUS			9

EXPLANATION OF CLASS CODE

STATION TO STATION	PERSON TO PERSON
B - NIGHT	C - NIGHT
K - DAY	L - DAY
S - EVENING	T - EVENING
	A - P-CB NIGHT
2 - WEEKEND	J - P-CB DAY
	/ - P-CB EVENING

356-3402

LONG DISTANCE SERVICE — SUPPLEMENTAL STATEMENTS

DATE	TELEPHONE NUMBER		PLACE CALLED		CODES TYPE	CODES CLASS	AMOUNT
12/14	803	345-5787	CHAPIN	SC	&	B	.84
12/14	803	564-3174	WAGENER	SC	&	S	.73
12/15	404	394-3079	CHAMBLEE	GA	&	S	1.30
12/15	803	229-5009	GREENWOOD	SC	&	S	3.45
12/15	516	822-4568	HICKSVILLE	NY	&	S	1.80
12/16	212	343-1000	QUEENS NYC	NY	&	K	4.25
12/16	803	476-8147	WOODRUFF	SC	&	B	.73
12/16	803	366-3460	ROCK HILL	SC	&	B	1.61
12/16	803	648-8504	AIKEN	SC	&	B	.22
12/17	803	657-5295	PONDBRANCH	SC	&	S	.23
12/17	803	637-3533	EDGEFIELD	SC	&	S	1.06
12/17	803	534-3249	ORANGEBURG	SC	&	S	.40
12/18	803	564-5969	WAGENER	SC	&	K	.23
12/18	803	532-5353	BATESBURG	SC	1	L	.86
12/18	704	525-0346	CHARLOTTE	NC	&	S	.40
12/18	803	366-3460	ROCK HILL	SC	&	S	.39
12/18	404	394-3079	CHAMBLEE	GA	&	S	.55
12/18	803	532-4416	BATESBURG	SC	&	K	.31

 CONTINUED ON NEXT PAGE

DEFENDANTS' EXHIBIT B - CHECK

TOTAL OF INVOICES			
LESS ____ % DISCOUNT			
LESS			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

NATIONAL EQUIPMENT RENTAL, LTD.
P.O. BOX 3473
NEW HYDE PARK, N. Y. 11040

65-330
35

3246

May 22 1974 1-103/210

PAY TO THE ORDER OF Southeastern Capital + Robert Kelly III Jointly $2437 34/100

THE SUM 2437 DOLS 34 CTS DOLLARS

NATIONAL EQUIPMENT RENTAL, LTD.

AUTH. SIG.

BANKERS TRUST COMPANY
529 FIFTH AVENUE
NEW YORK, N. Y.

7

070 7 29 243734

⑈003246⑈ ⑆0210⑈0103⑆ 007⑈4023499 5⑈ ⑈0000243734

DEFENDANT'S EXHIBIT B

Robert Kelly III
Southeastern Capital
By W.L. McClary III

BEST COPY AVAILABLE

A-191

DEFENDANTS' EXHIBIT C - CHECK

TOTAL OF INVOICES			
LESS ___ % DISCOUNT			
LESS			
TOTAL DEDUCTIONS			
AMOUNT OF CHECK			

NATIONAL EQUIPMENT RENTAL, LTD.
P.O. BOX 3473
NEW HYDE PARK, N. Y. 11040

3677

July 8 1974 1-10 210

PAY TO THE ORDER OF Al Stevens $5600 00/100

THE SUM 5600 00 CTS DOLLAR

NATIONAL EQUIPMENT RENTAL, LTD.

AUTH. SI

AUTH. SI

BANKERS TRUST COMPANY
529 FIFTH AVENUE
NEW YORK, N. Y.

7

⑈003677⑈ ⑆021000103⑆ 007⑈0234995⑈ ⑈0000560000

DEFENDANT'S EXHIBIT C

Al Stevens
Pd 1974

J 18 74 G 11 170C

DDDD
RSNY
LIRCPC

DEFENDANTS' EXHIBIT D - BILL OF SALE

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS

THAT, the undersigned, NATIONAL EQUIPMENT RENTAL, LTD., with a principal place of business at 410 Lakeville Road Lake Success, New York, in consideration of $ 85,000.00 and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby grant, sell, transfer and deliver to

Bush Evans Machinery
Box P
Concordia, Missouri 64020

its successors and assigns, the following equipment:

1 - International Model TD-15 Series C., Power Shift Crawler Tractor, Serial No. 1390
1 - Caterpillar 623 Tractor, Serial No. 52 U 487
1 - Caterpillar 623 Scraper, Serial No. 26 U 456

Missouri tax exemption # 054-02627

TO HAVE AND TO HOLD the same unto the said

Bush Evans Machinery

its successors and assigns, forever.

And the undersigned warrants that the undersigned is the true and lawful owner of the said equipment and that same is free from all encumbrances.

That said equipment is sold, as is where is, without warranty of any kind except as to title.

Dated at Lake Success, New York December 10, 1974.

NATIONAL EQUIPMENT RENTAL, LTD.

Gerald Jacob Scot

Sworn to and subscribed to before me this 10 day of December

Faye Friedkin

FAYE FRIEDKIN
NOTARY PUBLIC, State of New York
No. 30-6407930
Qualified in Nassau County
Commission Expires March 30, 19

DEFENDANT'S EXHIBIT D

DEFENDANTS' EXHIBIT E - CHECK

NATIONAL EQUIPMENT RENTAL, LTD.
P.O. BOX 3473
NEW HYDE PARK, N. Y. 11040

5727

Dec 23 1977 1-103/210

PAY TO THE ORDER OF Joe S Whitehurst $8500 00/100

EXACTLY $8500 AND 00 CTS DOLLARS

NATIONAL EQUIPMENT RENTAL, LTD.

Richard Neal AUTH. SIG.

Frank Nat AUTH. SIG.

DEFENDANTS' EXHIBIT F - LETTER FROM R. ZEVON
TO JOE WHITEHURST DATED NOVEMBER 7, 1974

DEFT. EXH. 3
WIT. ZEVON FOR ID
DATE 12/19/75
LAW REPORTING SERVICE

November 7, 1974

Mr. Joe Whitehurst
P.O. Box 6663
Hollywood, Fla 33021

RE: H. Walter Hendrix, III
50 205 A & B

Dear Joe:

Please accept this letter as your authorization to repossess the equipment which is on lease to the above-referenced lessee.

For your convenience, we are enclosing a copy of the lease, guarantee, purchase order, invoice, and U.C.C. filing.

Prior to any final sale, the price must first be approved by National.

Please keep us posted as to the disposition of the equipment.

Very truly yours,

R. Zevon

RZ/ds
Enclosures

DEFENDANT'S EXHIBIT
F EV
PENGAD - Bayonne, N.J.

DEFENDANTS' EXHIBIT G - INVOICE

DEFENDANT'S EXHIBIT G EL

INVOICE

Joe G. Whitehurst
agent for
NATIONAL EQUIPMENT RENTAL, LTD.
P. O. Box 3473
N. New Hyde Park, New York 11040

NO.

DATE 16 December, 1974

SOLD TO Rush Evans Machinery Co.
Box P
Concordia, Missouri 64020

SHIPPED TO

Commission to J. Whitehurst $8,500.00

YOUR ORDER NO.	OUR ORDER NO.	SALESMAN	
DATE SHIPPED	SHIPPED VIA	F.O.B.	TERMS

Ck 12/23/74

QUANTITY ORDERED	QUANTITY SHIPPED	STOCK NUMBER/DESCRIPTION	PRICE	PER	AMOUNT
	1	International Model TD-15, Series C., Power			
		Shift Crawler Tractor, Serial No. 1390			
	1	Caterpillar 623 Tractor, S/N 52 U 48			
	1	Caterpillar 623 Scraper, S/N 26U 456			
		Total Price, F.O.B. Columbia, S.C.			$85,000 00
		Missouri tax exemption #054-02627			

GrayLine "SNAP-A-WAY" FORM 44-401 3-PARTS
WILSON JONES COMPANY • ©1967 • PRINTED IN U.S.A.

DUPLICATE

673

DEFENDANTS' EXHIBIT H - CHECK

HOLLYWOOD NATIONAL BANK
HOLLYWOOD, FLORIDA 33021

№ 5250

63-802/670

DATE Dec 20, 19 74

PAY TO THE ORDER OF ****** NATIONAL EQUIPMENT RENTAL, LTD ***** $85,000.00

HOLLYWOOD NATIONAL BANK EIGHTY FIVE THOUSAND AND 00 CTS DOLLARS

CASHIER'S CHECK

AUTHORIZED SIGNATURE

⑆0670⑈08021⑆ 2990 006 1⑈

DEFENDANT'S EXHIBIT
H EL
7-1-26

PENGAD - Bayonne, N.J.

DEFENDANTS' EXHIBIT I - FINANCING STATEMENT

ANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code:

1. Debtor(s) (Last Name First) and address(es)

HENDRIX, III, H. WALTER
Route 1
Box 207
Lexington, S.C. 29072

2. Secured Party(ies) and address(es)

NATIONAL EQUIPMENT RENTAL, LTD.
P.O. Box 3473
No. New Hyde Park, N.Y. 11040

3. Maturity date (if any):

For Filing Officer (Date, Time, Number, and Filing Office)

FILED
9 00 AM '74
#3507
R.H.C.
LEXINGTON COUNTY

4. This financing statement covers the following types (or items) of property:

Lease No. 50-205 B

One (1) Caterpillar 623 Tractor, Serial No. 52U487

One (1) " 623 Scraper Ser. No. 26U456

5. Assignee(s) of Secured Party and Address(es)

FIRST NATIONAL BANK OF CHICAGO, as Agent
1 First National Plaza
Chicago, Ill. 60670

This statement is filed without the debtor's signature to perfect a security interest in collateral. (check ☒ if so)

☐ already subject to a security interest in another jurisdiction when it was brought into this state.

☐ which is proceeds of the original collateral described above in which a security interest was perfected:

Check ☒ if covered: ☐ Proceeds of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional Sheets presented:

Filed with:

TERMINATION STATEMENT: This Statement of Termination of Financing is presented to a Filing Officer for filing pursuant to the Uniform Commercial Code. The Secured Party certifies that the Secured Party no longer claims a security interest under the financing statement bearing the file number shown above.

Date _____ 19____

By: _____
(Signature of Secured Party or Assignee of record. Not Valid Until Signed.)

(3) Filing Officer Copy-Acknowledgement

Filing Officer is requested to note file number, date and hour of filing on this copy and return to the person filing, as an acknowledgement.

DEFENDANT'S EXHIBIT I EV
DEC 26

DEFENDANTS' EXHIBIT I(1) - FINANCING STATEMENT

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code:

3. Maturity date (if any):

1. Debtor(s) (Last Name First) and address(es)

HENDRIX III, H. WALTER
Route 1, Box 207
Lexington, S.C. 29072

2. Secured Party(ies) and address(es)

NATIONAL EQUIPMENT RENTAL, LTD.
P.O. Box 3473
No. New Hyde Park, N.Y. 11040

For Filing Officer (Date, Time, Number, and Filing Office)

4. This financing statement covers the following types (or items) of property:

Lease No. 50-50-205 A
One (1) International Model TD-15 Series C, Power Shift Crawler Tractor
Serial No. 1390

5. Assignee(s) of Secured Party and Address(es)

FIRST NATIONAL BANK OF CHICAGO, as Agent
1 First National Plaza
Chicago, Ill. 60670

This statement is filed without the debtor's signature to perfect a security interest in collateral. (check [X] if so)

☐ already subject to a security interest in another jurisdiction when it was brought into this state.

☐ which is proceeds of the original collateral described above in which a security interest was perfected.

Check [X] if covered: [X] Proceeds of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional Sheets presented:

Filed with:

TERMINATION STATEMENT: This Statement of Termination of Financing is presented to a Filing Officer for filing pursuant to the Uniform Commercial Code. The Secured Party certifies that the Secured Party no longer claims a security interest under the financing statement bearing the file number shown above.

Date _____ 19____ By: _____
(Signature of Secured Party or Assignee of record. Not Valid Until Signed.)

Filing Officer is requested to note file number, date and hour of filing on this copy and return to the person filing, as an acknowledgment.

(3) Filing Officer Copy – Acknowledgement

DEFENDANT'S EXHIBIT I/ EL

DEFENDANTS' EXHIBIT J - LIP SHEET

NATIONAL EQUIPMENT RENTAL, LTD.

LIP SHEET J

LEASE # 50-205

SCHEDULE A

DATE 5/6/74

( ) SECURITY AGREE.

( ) SALE LEASEBACK

(X) DISCOUNTED 15 3/4%

SUBMITTED BY: Jon Shoup

BRANCH & REP. Charlotte, J. Shoup

BROKER Southeastern Capital

COMM. $

COMM. $

$

LESS FEES: 1) F.F.

2) LIEN SEARCH

3) OTHER

TOTAL

BAL. DUE BROKER $ 2,437.34

For Lake Success Use Only

LIP # 00260

LIP DATE 5/9/74

% TAX 4

TAX CODE 41000

CHECKED BY JG

LEASE YIELD 15 3/4

PRIME RATE 11

LESSEE H. Walter Hendrix, III

BILLING ADDRESS Box 207, Lexington, S.C. ZIP CODE 29072

LOCATION OF EQUIPMENT: ( ) SAME AS ABOVE

( ) OTHER: ADDRESS Route 1

Lexington, S.C. ZIP CODE 29072 LOCATION COUNTY Lexington

COST OF EQUIP. $ 31,161.62

% TAX IF TO BE ADDED TO COST $

$

LESS TRADE IN— $

LEASE COST $ 31,161.62

LEASE TERM 49 months

MONTHLY FACTOR 27.80/1000

LEASE FACE $ 42,448.21

TAX FACE $ 1,697.85

RENTAL		MONTHLY	TAX 4 %	TOTAL
49	MO. @	866.29	34.65	900.94
	MO. @			
	MO. @			
CONTINUED RENTAL				
	MO./YR. @			
	MO./YR. @			

PAYABLE BY LESSEE

RETURNABLE DEP. $

FIRST MONTH $ 866.29

OTHER ADVANCE RENTAL TO BE APPLIED TO 49th MOS. $ 866.29

TOTAL ADVANCE $ 1,732.58

TAX ON ABOVE $ 69.30

FILING FEE $ 10.00

OTHER $

TOTAL TO BE PAID $ 1,811.88

PURCHASE OPTION 10 % = $ 3,116.16

RETURNABLE DEP. % = $

% SALES TAX ON RET. DEP. $

TOTAL RET. DEP. $

RECEIPTS

CHECK (DEPOSITED) $ 1,811.88

DATE 5/8

DEP. TO VENDOR $

TOTAL RECEIPTS $ 1,811.88

TO BE BILLED/CRED. $ -0-

DEFENDANT'S EXHIBIT J EV

PREPARED BY Lois Shoup

LIP 3/74 REV.

OVER FOR EQUIPTMENT DESCRIPTION AND SPECIAL INSTRUCTIONS

PLEASE FILL IN BELOW

NAME & ADDRESS OF VENDOR	DESCRIPTION OF EQUIPMENT	EQUIP. COST
Western Carolina Tractor Co. P.O. Box 9068 Columbia, S.C. 29290	1 International Model TD-15 Series C, Power Shift Crawler Tractor Serial No. 1390	$31,161.62
	TOTAL $	31,161.62

SPECIAL INSTRUCTIONS: This is "special broker" to be handled as regular branch deal, see copy of H. Weisberg's approval of this attached. Please pay $$2,437.34 (15 3/4% discount = 7.8216 X $31,161.62 = $2,437.34) to: SOUTHEASTERN CAPITAL, Box 3444, Charlotte, N.C. 28203

Jon discussed the insurance limits on this deal with J. Jacobs and Jerry indicated he could live with this.

EQUIPMENT - INFORMATION
(for Lake Success use only)

PURCHASE ORDER			
DATE	VENDOR	AMOUNT	EQUIP. NO.

RECEIPTS		
DATE	NATURE OF RECEIPT	AMOUNT

A-201

NATIONAL EQUIPMENT RENTAL, LTD.
P. O. BOX 3473, N. NEW HYDE PARK, N.Y. 11040

DATE ~~5/6/74~~

LESSEE: H. Walter Hendrix III

LIP # 6260 LEASE # ~~50-205 A~~

	%	COST	BASE COMM.	COMM.
2,500 TO 100,000	125	3161.50		2437.34
NEXT 50,000	110			
NEXT 100,000	100			
NEXT 250,000	90			
NEXT 250,000	75			
NEXT 250,000	66			
OVER	50			
TOTAL				

LEASE YIELD

PREV. COST (within 6 months)

SALESMAN Southeastern Capita

REGULAR

HOLDBACK

TOTAL 2437.34

FIGURED

CHECKED

A-202

NATIONAL EQUIPMENT RENTAL, LTD.
P. O. BOX 3473, N. NEW HYDE PARK, N.Y. 11040

LESSEE: H. Walter Hendrix, III

LIP# [illegible] LEASE # ~~50-205 A~~

	%	COST	BASE COMM.	COMM.
2,500 TO 100,000	125	311.61	1.25	389.52
NEXT 50,000	110			
NEXT 100,000	100			
NEXT 250,000	90			
NEXT 250,000	75			
NEXT 250,000	66			
OVER	50			
TOTAL				

DATE ~~5/6/74~~

LEASE YIELD 15 31/1

PREV. COST (within 6 months)

SALESMAN J. Shoup

REGULAR 311.61

HOLDBACK 77.91

TOTAL 389.52

FIGURED [illegible]

CHECKED [illegible]

A-202a

DEFENDANTS' EXHIBIT K - CHECK

NATIONAL EQUIPMENT RENTAL LTD.
P.O. BOX 3473 • N. NEW HYDE PARK, N.Y. 11040

NO. BT 9317

May 16 19 74

1-103
210

PAY $ 31,161.62

TO THE ORDER OF
WESTERN CAROLINA TRACTOR CO.
P.O.Box 9068
Columbia, So Carolina 29290

NATIONAL EQUIPMENT RENTAL LTD.

NON NEGOTIABLE

BANKERS TRUST COMPANY
529 FIFTH AVENUE
NEW YORK, N.Y. 10017

REMITTANCE STATEMENT

DETACH THIS STATEMENT BEFORE DEPOSITING CHECK
CHECK ATTACHED IS IN SETTLEMENT OF THE FOLLOWING

BT9317 Advance JB-HsC.

VENDOR'S INVOICE DATE	VENDOR'S INVOICE NO.	CONSIGNEE	PURCHASE NO.	AMOUNT OF INVOICE	DEDUCTIONS	NET AMOUNT
5/1/74						
	SO 95489	H.Walter Hendrix,III	SO 205A			31,161.62

DEFENDANT'S EXHIBIT
K EV

FILE COPY

A-203

DEFENDANTS' EXHIBIT L - INVOICE

ASHEVILLE, N. C. 28806
P. O. BOX 1205
PHONE 375-3751
CHARLOTTE, N. C. 28201

WESTERN CAROLINA TRACTOR CO.

PHONE [illegible]-4040
COLUMBIA, S. C. 29290
P. O. BOX 5815, STA. B
PHONE 288-6990
GREENVILLE, S. C. 29606

SOLD TO

NATIONAL EQUIPMENT RENTALS, LTD.
4530 Park Road
Charlotte, North Carolina 28209

SHIP TO: (SAME AS "SOLD TO" UNLESS SHOWN BELOW)

Mr. Walter Hendrix
Routel
Lexington, South Carolina

PLEASE MAIL REMITTANCE TO - P. O. BOX 9068 - COLUMBIA, S. C. 29290

INVOICE DATE	INVOICE NUMBER	DATE SHIPPED	OUR ORDER NO.	SHIPPED FROM	SHIPPED VIA
5-1-74	1	11-12-73	Co-95489	Columbia	DEL.

CUSTOMER ORDER NO.	CUSTOMER REQ. NO.	TERMS	USED ON
50-205A		NET CASH	

QUANTITY	PART NUMBER	DESCRIPTION	UNIT PRICE	TOTAL AMOUNT
1		INTERNATIONAL Model TD-15, Series C, Power Shift Crawler Tractor, Serial Number 1390; with IH-DT-466 diesel engine; Model 15CD4 Hydraulic Semi-U Bulldozer; Hydraulic Tilt; 22" CC track shoes; cast steel end bits; reversible fan; front pull hook; exhaust rain cap; tool box; water separator; fuel and hydraulic tank lock; back-up alarm; SAE ROPS Canopy; rear screen; and all standard equipment.		31,161.62
		Tax Exemption Number: 51-81348		

This invoice does not pass title. The title to all goods furnished hereunder shall remain in the seller until the full purchase price has been paid in full in cash, and nothing herein shall release the purchaser from paying therefor.

X-3

DEFENDANT'S EXHIBIT L EV

A 10% HANDLING CHARGE WILL BE MADE FOR ALL PARTS RETURNED, UNLESS WRONG PARTS ARE SHIPPED BY US IN ERROR
A 1% PER MONTH SERVICE CHARGE (ANNUAL PERCENTAGE RATE OF 12%) WILL BE CHARGED ON ALL PAST DUE ACCOUNTS

DEFENDANTS' EXHIBIT M - LIP SHEET

LEASE # 50-205
SCHEDULE B
DATE 6/18/74
SUBMITTED BY: J. Shoup
BRANCH & REP Charlotte/Shoup
BROKER A. Stevens, Soc.Sec. 461-74-6872 Summerton, S.C.
LESS FEES: 1) F.F. 2) LIEN SEARCH 3) OTHER TOTAL

( ) SECURITY AGREE.
( ) SALE LEASEBA
( ) DISCOUNTED %
COMM. $
COMM. $
$
BAL. DUE BROKER $ 5600.00

For Lake Success Use Only
LIP # 06562
LIP DATE 6/24/74
% TAX 4
TAX CODE 41000
CHECKED BY 93
LEASE YIELD 17
PRIME RATE 11.5

LESSEE H. WALTER HENDRIX, III

BILLING ADDRESS Route 1, Box 207, Lexington, S.C. 29072 ZIP CODE

LOCATION OF EQUIPMENT: (x) SAME AS ABOVE

( ) OTHER: ADDRESS
ZIP CODE LOCATION COUNTY Lexington

COST OF EQUIP. $ 84,442.74
% TAX IF TO BE ADDED TO COST $
$
LESS TRADE IN – $

LEASE TERM 42 months

MONTHLY FACTOR 32.50/1000

LEASE FACE $ [redacted] (115,264.38 + [redacted])

TAX FACE $ [redacted] (4610.76 + [redacted])

LEASE COST $ 84,442.74

RENTAL	MONTHLY	TAX 4 %	TOTAL
42	MO. @ 2,744.39	109.78	2,854.17
	MO. @		
	MO. @		
CONTINUED RENTAL			
	MO./YR. @		
	MO./YR. @		

PAYABLE BY LESSEE

RETURNABLE DEP. $
FIRST MONTH $ 2,744.39
OTHER ADVANCE RENTAL $ 5,488.78
TO BE APPLIED TO 41st & 42nd MOS.
TOTAL ADVANCE $ 8,233.17
TAX ON ABOVE $ 329.34
FILING FEE $ 10.00
OTHER $
TOTAL TO BE PAID $ 8,572.51

PURCHASE OPTION 10 % = $ 8,444.27
RETURNABLE DEP. % = $
% SALES TAX ON RET. DEP. $
TOTAL RET. DEP. $

RECEIPTS
CHECK (DEPOSITED) $ 8,572.51
DATE 6/21
DEP. TO VENDOR $
TOTAL RECEIPTS $ 8,572.51
TO BE BILLED/CRED. $ -0-

PREPARED BY L. Shoup

LIP 3/74 REV. OVER FOR EQUIPMENT DESCRIPTION AND SPECIAL INSTRUCTIONS

DEFENDANT'S EXHIBIT M EL

A-205

PLEASE FILL IN BELOW

NAME & ADDRESS OF VENDOR	DESCRIPTION OF EQUIPMENT	EQUIP. COST
Jeff Hunt Machinery Charleston Highway Columbia, S.C. 29201	1 Caterpillar 623 Tractor, s/n 52 U 487 1 " 623 Scraper, s/n 26 U 456	
	TOTAL $	84,442.74

SPECIAL INSTRUCTIONS:

As on Schedule "A", the insurance coverage provided on this heavy construction equipment would be acceptable to J. Jacobs inasmuch as it is not "over the road".

Please forward broker's check to our branch and we will deliver it to him:

Al Stevens, Social Security # 461-74-6872 ($5,600.00)

Please direct vendor's invoice for immedate payment...truck & heavy equipment dealers must be serviced real promptly, please.

EQUIPMENT - INFORMATION
(for Lake Success use only)

PURCHASE ORDER			
DATE	VENDOR	AMOUNT	EQUIP. NO.

RECEIPTS		
DATE	NATURE OF RECEIPT	AMOUNT

A-206

NATIONAL EQUIPMENT RENTAL, LTD.
P. O. BOX 3473, N. NEW HYDE PARK, N.Y. 11040

DATE 6/18/74

LESSEE: H. WALTER HENDRIX, III

LIP # (562) LEASE # 50-205B

	%	COST	BASE COMM.	COMM.
2,500 TO 100,000	125	8444 21		5600 00
NEXT 50,000	110			
NEXT 100,000	100			
NEXT 250,000	90			
NEXT 250,000	75			
NEXT 250,000	66			
OVER	50			
TOTAL				5600

Mail to Carolina Off

LEASE YIELD

PREV. COST (within 6 months)

SALESMAN Al Stevens
Soc. Sec. #461-74-6872

REGULAR

HOLDBACK

TOTAL 5600 00

FIGURED

CHECKED

NATIONAL EQUIPMENT RENTAL, LTD.
P. O. BOX 3473, N. NEW HYDE PARK, N.Y. 11040

DATE 6/18/74

LESSEE: H. WALTER HENDRIX, III

LEASE YIELD 17

LIP # 6562

LEASE # 50-205 B

PREV. COST (within 6 months)

	%	COST	BASE COMM.	COMM.
2,500 TO 100,000	125	84442 24	1.25	1055 53
NEXT 50,000	110			
NEXT 100,000	100			
NEXT 250,000	90			
NEXT 250,000	75			
NEXT 250,000	66			
OVER	50			
TOTAL				

SALESMAN ~~J. Shoup~~

REGULAR 844 42

HOLDBACK 211 11

TOTAL 1055 53

FIGURED DB

CHECKED

A-207

DEFENDANTS' EXHIBIT M(1) - ROUTING SHEET

DEFENDANT'S EXHIBIT M1

LIP # _____

Lessee: H. WALTER HENRIX, III Lease # 50 205 Schedule B

Billing Address: _____

Attention: _____ Tax Code # _____

Equipment Location: _____ Type _____

ROUTING SEQUENCE

Required Documents	Date		By:	Date	
Application		1.	R	6/21/74	Credit Appr.
Bank Ref.		2.			Legal Appr.
Trade Ref.		3.			Broker/Oper.
Financ. Stmts.					Mkt./Oper
D&B Report		4.			Lease Exec.
RCC Report					
Litig. Report		5.			County (UCC Fil)
Title Search					1.
					2.
Lien Search					
Secur. Agree.		6.			Check Rec'd
Lease/Sched.					Dep. to Vendor
Purch. Opt.					Sec. Dep.
UCC Stmt.					Adv. Rent (mos)
					Other/F.F.
AL Mort Waiver		7			P.O. Iss'd
Bill of Sale					Sales Tax %
Guarantees-I.G.		8.			Comm. to
C.G.		9.			Chart
		10			Vendor's Inv.Rec'd
Other					1.
Indem.Letter					2.
Repurch. Agree.					NER Misc. Inv.
Subord. Agree.		11.			Receipt of Equip.
Collat. Note					Sent
Assign of Contr.					Rec'd Dated
Assign of Stock		12.			NER Invoices
Bulk Sale					Due
Vehicle Title					Cr./Bal. Due
Cert' Rec'd		13.			Activated
S.D.I.C.		14.			Insur. PD/PL
					Other/Auto
		15			Microfilmed
		16			Gen. Ledgerd
		17			Completed File

SPECIAL INSTRUCTIONS

3.5% Tax. Schedule (submitted with Schedule A)
Change to formal Evidence Tax Header
Free placed 17 cc, Tax and Insurance

Vendor	Amount	NOE Sent	NOE Rec'd
20 Vendor	R		

A-209

DEFENDANTS' EXHIBIT N - PACKING LIST

Columbia, S.C. 29202
Branches: Charleston and Greenville

No. 46888

Date June 11, 1974

Sold to:

National Equipment Rental Ltd.
P.O. Box 3473
North New Hyde Park, N. Y. 11040

Caterpillar Equipment Parts, and Service

Ship To:
H. Walter Hendrix
Rt. 1, Box 207
Lexington, S. C. 29072

Ship VIA: Parcel Post | Truck | Bus | Pickup | Other

Sales Tax Exemption No. 51-87348 | Prepaid | Collect | Posted By | Checked By

Date Ordered | Customer Order No. | Ordered By | Terms: Net Cash upon receipt of invoice

Make | Model | Serial Number

Quantity Ordered	Back Ordered	Part Number	Replaced By	Location	Description	Quantity Shipped	Unit Price	Extension
1		Caterpillar 623 Tractor, C-H, Arrgt. 8D7300, S/N 52D487, with:						
		8D4805	Back-Up Alarm					
		7D2400	Alternator					
		8D6660	Brake					
		6D5490	Brake Shields					
		8D3720	ROPS Canopy					
		6D527	27.5-29, 28 PR Rock Tires					
		8D4175	Vandalism Kit					
		6D9750	Windshield Wiper					
1		Caterpillar 623 Scraper, Arrgt. 8J3929, S/N 26D456, with:						
		9J235	Back-Up Alarm					
		8J7757	Brake					
		6D6395	Brake Shield					
		8J8237	Fenders					
		5J3838	Teeth					
		6D527	29.5-29, 28 PR Tires					$84,442.74

Contested Esq

DEFENDANT'S EXHIBIT N EL

Filled By | Page ___ Of ___ | Back Order Trans. To Invoice No. | Received By | Total

Note: A 10% handling charge will be made on parts returned for credit. No credit can be allowed on items returned after 60 days.

Columbia

CATERPILLAR SALES, SERVICE & PARTS

PACKING LIST

DEFENDANTS' EXHIBIT O - CHECK

NATIONAL EQUIPMENT RENTAL LTD.
P.O. BOX 3473 • N. NEW HYDE PARK, N.Y. 11040

NO. BT 9609

July 2 19 74

1.103
210

PAY $ 24,442.74

TO THE ORDER OF JAY-BEE MACHINERY CO.

NATIONAL EQUIPMENT RENTAL LTD.

NON NEGOTIABLE

BANKERS TRUST COMPANY
528 FIFTH AVENUE
NEW YORK, N.Y. 10017

REMITTANCE STATEMENT

DETACH THIS STATEMENT BEFORE DEPOSITING CHECK
CHECK ATTACHED IS IN SETTLEMENT OF THE FOLLOWING

BT9609 Pg 40 JF-McCarol

VENDOR'S INVOICE DATE	VENDOR'S INVOICE NO.	CONSIGNEE	PURCHASE NO.	AMOUNT OF INVOICE	DEDUCTIONS	NET AMOUNT
6/11/74	48603	H.Walker Hendrix,III	50 205B			24,442.74

FILE COPY

DEFENDANT'S EXHIBIT
O
EL
5-5-26
PENGAD • Bayonne, N.J.

JUDGMENT APPEALED FROM

CLOSED

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ APR 08 1977 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff,

-against-

H. WALTER HENDRIX, III and
JEAN K. HENDRIX,

Defendants.

----------x

CLOSED

M'FILMED

This action having come on for trial on the issue of usury before the Court and a jury, Honorable Jack B. Weinstein, presiding, and the jury having rendered a verdict in favor of the defendant and the defendants' motion to dismiss the complaint having been granted by the Court without costs or disbursements, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant and that the defendant's motion to dismiss the complaint is granted without costs or disbursements.

Dated: Brooklyn, New York
April 7, 1977

Louis Orgel
Clerk

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

VINCENT PANZA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2002 Ellis Ave Bronx N.Y.C.

That on the 31 day of AUGUST, 1977, deponent personally served the within APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

STANLEY S. ARKIN
Attorney for Defendants-Appellees
300 Madison Avenue
New York, New York 10017

Vincent Panza

Sworn to before me this
31st day of August, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979